UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Jose Padilla, Petitioner, vs. **Commander C. T. Hanft**, USN Commander, Consolidated Naval Brig. Respondent	**C/A No. 2:04-2221-26AJ** **PETITIONER'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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ARGUMENT

The government's response boils down to the assertion that the executive branch has the power to seize and indefinitely detain in a military jail – without criminal charge – any American citizen whom it suspects of consorting with an enemy. No statute or constitutional clause provides this power, and our entire constitutional history militates forcefully against it.

To support its assertion of vast executive branch power, the government relies on *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942). Yet neither decision purports to address whether the military may detain indefinitely without charge any American citizen suspected of associating with a terrorist organization. Both *Hamdi* and *Quirin* are narrow decisions, carefully limited by the Supreme Court to their facts. But the government would strip away these careful limitations, leaving the executive with unbridled power to create a shadow system of detention for citizens in the U.S. suspected of wrongdoing. Such a detention system is fundamentally incompatible with the Constitution. Like the Framers of the Constitution, the Supreme Court in *Hamdi* and *Quirin* recognized the crucial roles played by Congress and the courts in guaranteeing that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 124 S.Ct. at 2650 (plurality op.) (*citing Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952)).[1] The extraordinary, but narrow, authority recognized in *Hamdi* and *Quirin* do not support the government's assertion of power in this case.

[1] Respondent seeks to diminish *Youngstown* by calling it a case about a "domestic economic initiative." Opp. 11. Yet in *Youngstown* the Executive had invoked the Commander-in-Chief Clause as authority for its seizure of steel mills to ensure battlefield munitions during the Korean War. Here the Executive goes further, claiming the power to seize not steel, but citizens.

I. The Executive Branch Seeks Unprecedented Powers

The Executive asserts that Padilla returned to the United States from a trip abroad intending to commit terrorist acts at some undetermined point in the future.[2] But this summary judgment proceeding is not primarily about those assertions. It is about the Executive's claim that it has the legal authority to detain in military jails, indefinitely and without charge, any citizen that it suspects of associating with an enemy of the state.

The Executive's recent statements in other proceedings regarding how broadly it construes the "enemy combatant" category demonstrate how, once the limitations from *Quirin* and *Hamdi* are discarded, the power the government asserts has no natural boundaries and expands inevitably to astonishing breadth. The government's arguments in these cases make clear how dangerous it would be for the courts to adopt, without any legislative guidance, a definition of "enemy combatant" that reaches beyond the classic battlefield detainee scenario recognized in *Hamdi*. In oral argument in the U.S. District Court for the District of Columbia less than two weeks ago, Executive branch lawyers said that a "little old lady" who sent a check to "what she thinks is a charity that helps orphans in Afghanistan" could be detained in military custody indefinitely, without charge or trial, if unbeknownst to her the donation was passed on to terrorists. *Rasul v. Bush*, No. 02-0299, D.D.C., Tr. of 12/1/2004 hearing, at 25. As the Deputy Associate Attorney General starkly stated, "someone's intention . . . is not a factor that would disable the military from detaining the individual as an enemy combatant." *Id.* That was no slip of the tongue. Later in the argument, the Department of Justice attorney stated that a teacher who taught English to the son of a terrorist could also be militarily detained, indefinitely without charge, because "Al Qaeda is seeking to train its operatives to learn English." *Id.* at 27. In the

[2] Petitioner does not concede those assertions, which are based on a single piece of inadmissible evidence that lacks any indicia of reliability. *See* Part VI *infra*.

Executive's view – in its own words – teaching English to terrorists' children is tantamount to "shipping bullets to the front lines," and transforms the teacher into an "enemy combatant." *Id.*

Put simply, the Executive argues that it has the power to deprive any citizen, anywhere, and anytime, of the right to have accusations judged by a jury of his peers – merely by labeling him an "enemy combatant." The accumulation in a single branch of such unprecedented power over the nation's citizens would be constitutionally troubling even if wielded only for a brief time. But the Executive does not claim a sort of "emergency power" with temporal limits. To the contrary, the President has acknowledged that the source of any military power over citizens – the war on terror – will most likely never end.[3] As importantly, the Executive claims that only *it* can determine when the war is over, and only it can determine when the extraordinary powers given by the war have passed. Opp. 20 n.11. In the end, the Executive seeks a permanent enhancement of power that would dramatically upset our constitutional system.

Were this Court to conclude that the President has the power to detain Padilla without charge under the facts alleged, it would then have to determine the proper procedures by which the government's evidence (if any) could be tested. Although the procedures hinted at by the *Hamdi* plurality might be suitable for some battlefield detainees, they would be a constitutionally inadequate substitute for criminal process for citizens arrested far from any field of battle based simply on suspicion of having "associated" in some way with the enemy. While courts could conceivably invent different procedures for each different kind of "enemy combatant" (from battlefield detainee to little old lady), embarking down that path of ad hoc judicial legislation could encroach on Congress's own prerogatives. Before the courts even consider endorsing a

[3] Mike Allen, *Bush Tones Down Talk of Winning Terror War*, WASH. POST, Aug. 31, 2004 at A06.

new shadow system of preventive detention of citizens, they should require Congress to have spoken a great deal more clearly than it has about the parameters of such a system.

II. Common Sense and the Clear Statement Rule Make Plain that Congress Did Not Authorize Padilla's Detention Without Trial

1. The Executive denies the existence of the long-standing requirement that any statute seeking to curtail Americans' freedoms do so clearly and unmistakably. In *Gutknecht v. U.S.*, the Supreme Court unambiguously held that "[w]here the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them." 396 U.S. 295, 306-07 (1970) (quotations omitted). *Gutknecht* involved a federal regulation allowing military draft boards merely to accelerate the military induction of a citizen-draftee who delinquently failed to keep possession of his draft card. *Id.* at 298-300. Because the Court could find no clear statutory authorization for accelerating induction, it rejected the attempt. *Id.* at 307. The present case concerns a curtailment of freedom much more grave: not the accelerated beginning of a fixed term of military service, but indefinite military imprisonment. It would be absurd to require a clear statement to authorize accelerated military induction but not military imprisonment. Confounded by the ordinary rule, the Executive ignores *Gutknecht* – as it ignores most of the cases cited to support the clear statement rule. *Compare* Opp. 21-24 *with* Mem. 10-13.

Those few cases that the Executive does not ignore, it misconstrues.[4] Its claim that *Hamdi* "specifically rejected" the clear statement rule, Opp. at 24, is utterly without support: in fact, the *Hamdi* plurality *reiterates* the clear statement rule. Though the plurality thought that the "specific language of detention" was not a prerequisite to a clear statement, it understood "detention to prevent a combatant's return to the battlefield" to be "a *fundamental* incident of

[4] *E.g.*, *Brown v. U.S.*, 12 U.S. 110, 126 (1814). Chief Justice Marshall made clear that authority to use force does not grant the President authority to confiscate enemy "persons or property" found domestically – though the Executive prefers to omit the "persons" part. Opp. 23 n.13.

waging war" and therefore concluded that "in permitting the use of 'necessary and appropriate force,' Congress has *clearly and unmistakably* authorized detention *in the narrow circumstances considered here*." 124 S.Ct. at 2641 (emphasis added) (*citing* sources describing long-standing law of war principle that detention of battlefield combatants is incident to battle). A finding of "clear[] and unmistakabl[e]" Congressional authorization satisfies – not alters – the clear statement rule. *Id.* at 2641.[5]

The Executive's parsing of *Quirin* likewise loses the forest for the trees, as it ignores the key fact – that in *Quirin*, "Congress ha[d] *explicitly* provided" for military tribunals by clearly maintaining the concurrent jurisdiction of military tribunals and unmistakably "authoriz[ing] trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy." 317 U.S. at 27-28 (emphasis added).[6]

2. The long-standing requirement that Congress "clearly and unmistakably" authorize government curtailment of citizens' liberties guarantees that the Executive's Washington bureaucrats are not left with the final word on our freedoms. Representatives from our own states and towns must clearly decide whether to infringe their neighbors' liberties in the name of some perceived greater good. Our local representatives are accountable to their neighbors in ways that Executive officials can never be, and the rule requiring our representatives to speak clearly when

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[5] *Ex parte Endo* is much the same. While *Endo* observed in passing that detention of a citizen spy or saboteur "*might*" in some circumstances be "clearly and unmistakably" authorized by a statute lacking "the language of detention," the *Endo* Court found the petitioner's detention *not* authorized by statute and held unequivocally that courts "must assume . . . that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." 323 U.S. 283, 300-02 (1944) (emphasis added).

[6] Respondent's attempt to rely on *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Opp. 26-27, is completely without merit. *See* Mem. 18 n.13.

curtailing their neighbors' freedoms ensures that their efforts to balance personal freedom and national security will be influenced by the citizenry's own values.

Nothing makes that clearer than this case. Days after the attacks of September 11 – which were committed by aliens – Congress authorized the use of force. The authorization's language and legislative history show that Congress clearly contemplated troops and battlefields, but there is no indication that Congress contemplated the detention without charge of citizens suspected of working with terrorists. Less than six weeks later, Congress passed the Patriot Act – in order, as the Executive correctly notes, to "*expand*[] the government's authority to detain aliens" without charge. Opp. 26 (emphasis original).[7] Congress vigorously debated that expansion of Presidential power. *See generally* Christopher Bryant and Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002) (describing debates). It carefully limited the extent of that power. *See* 8 U.S.C. § 1226a (a) 5-7, (b). Yet the Executive would have this Court believe that, six weeks earlier, Congress had given the President an even more expansive *unlimited* detention power over *citizens* – without a single word of debate. Common sense would require rejecting that argument even if there were no clear statement rule. No rational review of the Congressional Record could conclude that Congress gave the Executive branch this awesome power over citizens – without any Presidential request, any Congressional debate, or any plain statutory language. *See* Mem. 16-21.[8]

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[7] The Executive's argument that 8 U.S.C. § 1226a(a) covers a broader category of aliens than "enemy combatants" is contradicted by its simultaneous arguments about the limitless nature of the enemy combatant category. *See supra* Pt. I (noting recent Executive arguments about "little old lad[ies]" and English teachers). § 1226a(a) permits detention without charge of aliens suspected of involvement in "terrorist activities," "sabotage," "espionage," and "overthrow of, the Government of the United States by force, violence, or other unlawful means."

[8] Respondent's argues that the AUMF "cannot plausibly be read" not to authorize "detention of combatants found within the United States – i.e., combatants identically situated to those that carried out the September 11 attacks." Opp. 25. That argument makes three fatal errors. First, it

III. Neither *Hamdi* Nor *Quirin* Requires Setting Aside Common Sense or the Clear Statement Rule.

1. Unable to satisfy the plain statement rule or common sense, the Executive turns to *Hamdi* and *Quirin* to shore up its argument that it cannot be bothered to go to Congress before detaining citizens in military jails indefinitely without charge. Neither case supports this argument.

In *Hamdi*, the Supreme Court held that Congress has authorized the military to detain without charge those citizens captured fighting on a foreign battlefield in a time of war. 124 S.Ct. at 2639-40 (plurality op.); *id.* at 2660 (concurring op.). *Hamdi* is an exceedingly narrow decision that provides no support to the Executive's current claims. The plurality opinion made clear that "for purposes of this case, the 'enemy combatant' that [the executive branch] is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners *in Afghanistan* and who engaged in an armed conflict against the United States *there*. We therefore answer only the narrow question before us: whether the detention of citizens falling within *that definition* is authorized." *Id.* at 2639 (internal quotations omitted) (emphasis added). The plurality regularly reiterated these limits.[9] Indeed, in rebutting Justice Scalia's argument that the Habeas Suspension Clause precluded the AUMF from authorizing even the

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ignores the fact that every one of "those that carried out the September 11 attacks" were aliens, not citizens. Second, it ignores the fact that federal law already provided statutory mechanisms by which every single 9/11 attacker could have been detained if found in the U.S. (Thus, the alleged would-be "20th hijacker," Zaccarias Moussaoui, *was* detained by the federal government before 9/11.) Third, it ignores that Congress explicitly addressed whether it was advisable to augment the Executive's power to detain aliens in the Patriot Act, not the AUMF.

[9] *See e.g., id.* at 2641 (Congress authorized detention only "in the narrow circumstances considered here."); *id.* at 2642 (holding executive branch "may detain, for the duration of these hostilities, individuals legitimately determined to be *Taliban combatants* who 'engaged in an armed conflict against the United States.' If the record establishes that United States troops are still involved in *active combat in Afghanistan*, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF.") (emphasis added); *id.* at 2645 (noting that Hamdi had not conceded being "*captured* in a zone of active combat operations in a foreign theater of war") (italics in original; underlining added).

battlefield detention of American citizens, the plurality responded that the dissent "largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone." *Id.* at 2643 (emphasis original). The plurality thus goes no further than finding that Congress authorized the President to detain without charge, as "enemy combatants," those citizens (1) "engaged in an armed conflict against the United States" (2) who were "captured in a zone of active combat operations" in (3) "a foreign theater of war."[10] *Id.* at 2639, 2645.

Even if the plurality opinion were the majority opinion, those would be the limits of the case. But there was no majority opinion. The Court was able to issue a judgment only because two concurring justices "join[ed] with the plurality to produce a judgment" explicitly in order to "give practical effect to the conclusions of eight members of the Court rejecting the Government's position. . . ." *Id.* at 2660 (concurring op.).[11] Though the concurrence thought that the detention without charge even of an American citizen captured on an overseas battlefield was "forbidden by [the Non-Detention Act, 18 U.S.C.] § 4001(a) and unauthorized by the Force Resolution [AUMF]," it set aside those objections in order to concur in the judgment and ensure certain procedural rights for "someone in Hamdi's position" on remand. *Id.* Because no opinion commanded a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Marks v. U.S.*, 430 U.S.

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[10] The plurality's repeated warnings about the limits of its holding were not accidental. The Court expedited briefing in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), so the merits of *Hamdi* and *Padilla* could be argued on the same day. Together, the cases presented a broad common question – the limits of Presidential power over the indefinite military detentions without charge of American citizens – in two significantly different situations: a citizen captured on a traditional battlefield abroad (*Hamdi*), and a citizen seized from a civilian setting in the U.S. (*Padilla*).

[11] The government repeatedly cites the lone dissent of Justice Thomas – despite the fact that he was the only justice to disagree with the "eight members of the Court rejecting the Government's position." *Id.* Justice Thomas' nearly limitless view of the government's military power over American citizens is neither the "narrowest grounds" nor even a "position taken by those Members who *concurred* in the judgments," *Marks*, 430 U.S. at 193 (emphasis added).

188, 193 (1977) (internal quotation omitted), *reiterated with approval by Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). The limitation of the concurrence to "someone in Hamdi's position" underscores emphatically the limits of the plurality's own analysis. Were there any doubt about the plurality's own limits, those doubts should be resolved in favor of the "narrowest grounds," *Marks*, 430 U.S. at 193, and restricted to "someone in Hamdi's position." 124 S.Ct. at 2660.

Jose Padilla is simply not "someone in Hamdi's position." *Id.* The government does not even allege that Padilla was "captured in a zone of active combat operations" in "a foreign theater of war," *id.* at 2645, and so does not satisfy the necessary preconditions to detention without charge of a citizen as an "enemy combatant." Anticipating the distinction that the Supreme Court would make, Judge Wilkinson found more than a year ago that "[t]o compare this battlefield capture [in *Hamdi*] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring). This Court should reject the government's invitation to ignore these fundamental distinctions.[12]

Nor does *Quirin* help the government. Respondent properly notes the "'well-settled presumption that Congress understands the state of existing law when it legislates.'" Opp. 25 (*quoting Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988)). Congress is presumed to have understood two pieces of that "existing law": (1) the requirement that a statute "clearly and unmistakably" authorize curtailments of citizens' freedoms, regularly reiterated from 1944 to the

[12] To try to fit Padilla under the *Hamdi* rule, the Executive newly argues that Americans are somehow not in America when they are in American airports, so Padilla's Chicago arrest was not "'in' the United States." Opp. 12 n.6. While some courts have held that an alien's physical presence in the U.S. does not always constitute "entry" into the U.S. in the immigration law sense, *see U. S. v. Kavazanjian,* 623 F.2d 730, 736 (1st Cir. 1980) ("physical presence of an alien in this country [must be] accompanied by freedom from official restraint" to constitute "entry"), no court has held that a citizen in an American airport is not "in" the U.S. In any event, Padilla was "free[] from physical restraint" at O'Hare, as the government conceded by stating that he was free to travel voluntarily to New York to testify before the grand jury. *See* Stip. of Fact.

present, *see supra* at 4-6; and (2) the Non-Detention Act, 18 U.S.C. § 4001(a), which Congress passed in 1972 in order to prevent the President from detaining, *inter alia*, citizens suspected of sabotage or espionage unless expressly authorized to do so by Congress. *See* Mem. 14-16.[13] Both post-dated *Quirin*. The fact that *Quirin* found that Congress had "*explicitly* provided" for trial before military tribunals through the statutory Articles of War – i.e., *not* through the authorization to use force manifest in the Declaration of War against Germany – undermines rather than supports the Executive's argument that citizens' detention without charge was implicitly included in the authorization to use force. 317 U.S. at 28 (emphasis added). The same is true of the Non-Detention Act, which bulwarked the requirement that Congress clearly authorize the detention of *citizens* by providing them with additional guarantees. 18 U.S.C. § 4001 (a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."). These two pieces of "existing law" make clear that, with or without *Quirin*, the AUMF did not authorize the indefinite detention without charge of citizens.

Even if *Quirin* had not been followed by both the Non-Detention Act and repeated reiterations of the clear statement rule, it would still not justify Padilla's detention without trial. The *Quirin* saboteurs entered the United States wearing military uniforms and carrying explosives on the direct command of "an officer of the German High Command," 317 U.S. at 21-22, as the saboteurs explicitly "stipulated," *id.* at 20. By wearing uniforms and following the orders of a superior officer in the military command of a nation against which the United States was formally at war, the *Quirin* saboteurs *asserted military status* – and so invoked the

[13] *See also generally* Brief of *Amici Curiae* Original Congressional Sponsors of 18 U.S.C. § 4001(a) in *Rumsfeld v. Padilla*.

protections of the law of war.[14] Asserting military status by wearing uniforms allowed them to invoke the aid of the law of war: had the *Quirin* saboteurs been captured landing in uniform, with explosives, from enemy submarines, they could only have been detained as POWs – not punished or executed for their attempted military attack.[15] To be sure, that assertion of military status also carried risks, as it allowed them – including Haupt, the presumed American among them – to be subjected to trial by a military commission rather than a civilian court. But the *Quirin* saboteurs were apparently willing to take the bitter with the sweet. As the Court made clear, the saboteurs could not first seek the protection of the law of war and later evade the consequences of violating the very same law. 317 U.S. at 37-40. There was equity in that.[16]

The Executive, however, is not willing to take the bitter with the sweet, and claims the power to subject to military jurisdiction anyone whom it suspects of being a threat to national security – whether or not that person has asserted military status. *See* Pt. I, *supra*. Padilla has of course not asserted military status – not by wearing a uniform and carrying explosives on a superior officer's orders, not in any way.[17] The Executive, though, would run roughshod over that long-standing limit on its military power – as it would cross so many other settled limits – aggregating

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[14] Respondent argues that some saboteurs were not members of the Germany Army. Opp. 16 (*citing* 2004 book). The argument is irrelevant, since the *Quirin* saboteurs asserted military status – thereby incurring military jurisdiction – whether or not they were formally enrolled in the German military. Moreover, the Supreme Court appears to have presumed that the saboteurs were soldiers, as it described them as employees of the "German High Command" who had received "their German uniforms" and "instructions" from "officers." 317 U.S. at 21-22.

[15] Hague convention, Oct. 18, 1907, Art. I of Annex, 36 Stat. 2295; *cf. Padilla v. Rumsfeld*, 352 F. 3d 695, 732 (2d Cir. 2003) (Wesley, J. concurring).

[16] *See Hamdi*, 124 S.Ct. at 2642 (plurality op.); *see generally* Brief of Louis Henkin et al. as *Amici Curiae* at 18-22, *Rumsfeld* v. *Padilla*, 124 S.Ct. 2711 (2004).

[17] Indeed, the Executive has made clear that it would not grant any of the protections of the law of war even if they *were* invoked, meaning that the equitable *quid pro quo* described in *Quirin* – law of war consequences for law of war protections – would not sanction military jurisdiction

to itself the power to determine who among our citizens it may tear from the normal constitutional framework and subject to military jurisdiction. Our entire constitutional history rejects that claim.[18]

2. The Executive lards its analysis with implications that an adverse decision would undermine national security. But the Executive can disable individuals whom it suspects of potential danger through a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit."[19] More importantly, though, the Executive's views about why the power to militarily detain someone in Hamdi's position should be extended to include the power to detain someone in Padilla's position are arguments about what Congress should in the future do – not reasons for this Court to skew its analysis of what Congress *has already done*.[20] If the Executive thinks its detention powers insufficient, it can seek Congressional approval for an expansion of those powers – just as it sought Congressional approval in the Patriot Act for the detention without charge of non-citizens suspected of consorting with terrorists.

IV. The President Has No Inherent Power to Detain Padilla Without Charge

The Executive asserts that even if Congress had never passed the AUMF, the President has the inherent constitutional power to detain in military prisons, indefinitely and without charge,

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even if Padilla had invoked military status. *See* White House Press Sec'y, Fact Sheet, Status of Detainees at G'tmo (2/7/02), www.white-house.gov/news/releases/2002/02/20020207-13.html.

[18] *See* Brief for Rutherford Inst. *et al.* as *Amici Curiae* in *Rumsfeld* v. *Padilla*, 124 S.Ct. 2711.

[19] *Hamdi*, 124 S.Ct. at 2657 (concurring op.); *see also* Brief for Janet Reno, *et al.*, as *Amici Curiae* at 14-29 & n.17, in *Rumsfeld v. Padilla*, 124 S.Ct. 2711.

[20] E.g., the Executive argues that an "enemy combatant rule that turns on the locus of one's capture" provides a "perverse incentive" because it encourages enemies to come to the U.S. in order to evade military jurisdiction. Opp.14. There is no reason to think that al Qaeda terrorists make decisions based on jurisdictional considerations. Even if they did, the resolution of this case would not attract them to the U.S. – because the odds of getting caught here are higher.

citizens seized in a civilian setting in the United States. Opp. 10-11. No President has ever claimed such a vast and unchecked inherent power. Even the power claimed in *Korematsu* rested on the Executive's ability to enforce a Congressional act.[21] Perhaps aware that the claim is historically aberrant, the Executive quickly retreats to the position that its power to maintain this indefinite detention without charge of a citizen rests on the AUMF. Opp. 11 *et seq.* *Contra* Mem. 22-34 (showing that such power would radically alter Framers' checks and balances); *see also* *Hamdi*, 124 S.Ct. at 2659 (concurring op.) (noting "the weakness of the Government's mixed claim of inherent, extrastatutory authority" and "recall[ing] Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military") (*citing Youngstown*, 343 U.S. at 643-44) (Jackson, J., concurring)).[22]

V. The Views of At Least Five U.S. Supreme Court Justices Are Not Irrelevant

Respondent properly notes that a court's task "is not to predict what the Supreme Court might do but rather to follow what it has done." Opp. 27 (quotation omitted). For all the reasons set forth above, following what the Supreme Court has done requires that the writ be granted.

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[21] *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (describing Act of March 21, 1942, 56 Stat. 173, which criminalized violation of military orders related to Japanese removal).

[22] *The Prize Cases*, 67 U.S. 635 (1862), do not help Respondent. President Lincoln responded there to a crisis when Congress was not in session (and due available transportation could not quickly reconvene), and Congress quickly ratified Lincoln's decision when it returned. Here, the Executive ordered the military to seize Padilla more than two years ago but Congress has never ratified the order – though it has specifically acted to enhance criminal penalties for things Petitioner is alleged to have planned. *See* Intelligence Reform and Terrorism Prevention Act of 2004, S. 2845, 108th Cong., §§ 6905, 6601 *et seq.*, (enhancing criminal penalties for attending terrorist training camp or plotting dirty bomb) (awaiting Presidential signature as of this filing). Moreover, *The Prize Cases* authorized an Executive seizure of *property* in a combat zone (subject to judicial review), not the seizure of a *person* outside a combat zone.

But if this Court has any doubt, it is appropriate to measure those doubts against the analyses and conclusions that the justices have shared in published judicial opinions.[23] The dissenting opinion of four justices in *Rumsfeld v. Padilla* and Justice Scalia's dissenting opinion for two justices in *Hamdi* reveal those justices' views of what the Supreme Court "has done."[24] And they accord with the view of the only federal appeals court to have considered this issue.[25]

VI. Respondent Produced No Admissible Evidence Supporting Its Allegations

Contrary to the government's suggestion, Petitioner does not concede that the Executive branch's pleadings must be assumed true in a motion for judgment prior to trial. *See* Opp. 3 n.1. Rather, Petitioner argues that because the government's legal position is fundamentally flawed, he is entitled to judgment "*even if* all of the facts pleaded by the Executive Branch are assumed to be true." Mem. 1 (emphasis added).

Although the Court need not reach the issue at this time, Petitioner would also be entitled to judgment as a matter of law on the basis that Respondent has produced *no* admissible evidence supporting its factual allegations about Padilla. It is well-established that a party "may not rest on the mere allegations" of his pleadings when responding to a motion for summary judgment, but

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[23] Indeed, Respondent is on thinner ice when it urges this Court to combine Justice Thomas's lone dissenting voice in *Hamdi* with bits of dicta in the plurality opinion – most certainly not "the narrowest grounds" of "those Members who *concurred* in the judgments," *Marks*, 430 U.S. at 193-94 (emphasis added).

[24] Respondent fails to negate the importance of the *Padilla* dissent. True, the sentence concluding that the President's detention of Padilla is not authorized "is phrased in the first person," Opp. 27, but so is the rest of the dissent (and so is almost every concurrence or dissent). Nor does it matter that the dissent spoke of Padilla's "incommunicado" detention. *Id.* The phrase was descriptive, and nothing in the Non-Detention Act or the AUMF (which the dissent cites to support its conclusion that detention is not authorized) suggests that detention with some communication is permissible.

[25] *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) The Second Circuit was reversed on jurisdictional grounds – not on the merits of its decision that nothing in our law authorizes Padilla's indefinite detention in a military jail without charge. *Rumsfeld*, 124 S.Ct. at 2715.

rather "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). Affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.*[26]

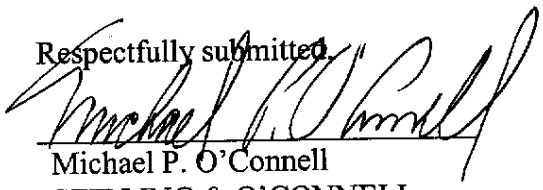
The only thing the government uses to support the facts it alleges about Padilla is an affidavit that is *not* "made on personal knowledge," *not* "admissible in evidence," and that does *not* show "that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. Proc. 56(e); *see* Answer 4-7. The affiant plainly has no first-hand knowledge of his allegations regarding Padilla, and the government has provided no reason to think that its putative facts were obtained in any manner that would permit their introduction into evidence. Indeed, reports suggest that the alleged hearsay statements upon which the affiant likely relies were obtained through illegal (even criminal) methods. *See* Reply at 2-3 (*citing* reports). And Respondent's own officials and attorneys acknowledge that such information lacks any indicia of reliability. *Id.*; *see also Bran v. U.S.*, 168 U.S. 532, 546 (1897) (rejecting the use of such evidence because "pain and force may compel men to confess what is not the truth of facts.").

CONCLUSION

The Petitioner's motion for Summary Judgment should be granted.

[26] *See also U.S. v. Roane*, 378 F.3d 382 (4th Cir. 2004) (affidavits containing only "'conclusory assertions and hearsay statements [do] not suffice' to stave off summary judgment").

Respectfully submitted,



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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Jose Padilla, Petitioner, vs. **Commander C. T. Hanft**, USN Commander, Consolidated Naval Brig. Respondent	**C/A No. 2:04-2221-26AJ**

CERTIFICATION OF SERVICE

This is to certify that on this 13th day of December, 2004, a copy of the foregoing Petitioner's Reply Brief in Support of Motion for Summary Judgment along with an accompanying separate appendix was mailed, via United States first-class mail, postage prepaid, to:

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Jose Padilla, Petitioner, vs. **Commander C. T. Hanft**, USN Commander, Consolidated Naval Brig. Respondent	**C/A No. 2:04-2221-26AJ** **PETITIONER'S APPENDIX TO REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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APPENDIX TO REPLY BRIEF
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL, et al.,	.	Civil Action Nos.
	.	
Petitioners,	.	02-0299, 02-0828, 02-1130,
	.	04-1135, 04-1136, 04-1137,
v.	.	04-1144, 04-1164, 04-1194,
	.	04-1227, 04-1254
GEORGE WALKER BUSH, et al.,	.	
	.	Washington, D.C.
Respondents.	.	Wednesday, December 1, 2004
	.	10:00 a.m.
. . . . .	.	

TRANSCRIPT OF MOTION TO DISMISS
BEFORE THE HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE

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Official Court Reporter

that belongs to the President. And I'm sorry, Your Honor, I cut you off. You had another question.

THE COURT: I want to go back to give you some hypotheticals, and very quick answer, very quick hypotheticals, about when an individual would be considered -- because it goes together with your most recent answers to me -- would be considered again an enemy combatant or supporting those forces, the Taliban, al-Qaeda and the like.

A little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance al-Qaeda activities. Would she be considered an enemy combatant or supporting? Now, these are real questions. I know you smile, but they are questions.

MR. BOYLE: Let me answer it on two levels. First I would say that someone's intention or motivation for being a part of al-Qaeda forces or Taliban forces, for instance somebody who says well, I didn't really want to do this, but I was brought along unwillingly, this was never my gig, but I just got caught up in the moment, never my intention. But that, as I think is clearly defined by tradition, is not a factor that would disable the military from detaining the individual as an enemy combatant.

It may be a factor that, in the discretion of the military, would be considered in the annual review process to determine whether the person can be released without danger to the

taken place, is an enemy combatant?

MR. BOYLE: I'll give you the same analysis.

THE COURT: That's what I thought it would be. How about a resident of Dublin, England who teaches English to the son of a person the CIA knows to be a member of al-Qaeda. Would that teacher be considered an enemy combatant under those circumstances?

MR. BOYLE: I think he could be. And let me explain why. It could be that al-Qaeda is seeking to train its operatives to learn English for purposes of staging operations here. I think it's within the power of our self-defense to detain the people who are providing that service support to al-Qaeda, just as it would be to detain those who are, you know, shipping bullets to the front lines, or providing information that al-Qaeda considers valuable in planning operations.

THE COURT: Let me give you two more. Let's assume a Mr. --

MR. BOYLE: Are these of your own creation, Your Honor?

THE COURT: Yes, sir. You like them?

(Laughter.)

MR. BOYLE: I'm enjoying this immensely.

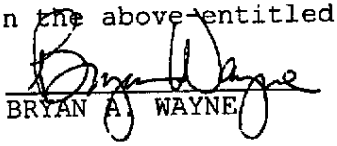
THE COURT: You don't have to answer that. That wasn't fair. Sorry.

(Laughter.)

* * * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.



BRYAN A. WAYNE

Bryan A. Wayne, RPR, CRR
Official Court Reporter

No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN
as Next Friend of Jose Padilla,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LOUIS HENKIN, HAROLD HONGJU KOH, AND MICHAEL H. POSNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are experts in the protection of human rights under constitutional and international law.[1] They submit this brief to challenge the premise that with respect to this case, "*inter arma silent leges*" ("in wartime, the laws are silent"). The "war against terrorism" did not transform respondent Jose Padilla into an "extra-legal person," devoid of legal rights. As a U.S. citizen detained on U.S. soil, Padilla enjoys protections under United States law and international law that cannot be repealed by the President, acting alone.

Louis Henkin is University Professor Emeritus and Special Service Professor at Columbia University Law School, where he has held chairs in constitutional law and international law and diplomacy. He is currently the Chair of the Center for the Study of Human Rights and Director of the Human Rights Institute at Columbia University Law School. He has served as U.S. Member of the Human Rights Committee, Chief Reporter of the *Restatement (Third) of the Foreign Relations Law of the United States*, Co-Editor-in-Chief of the *American Journal of International Law*, and President of the American Society of International Law. His numerous publications on the subjects of constitutional law and international law include *Constitutionalism, Democracy and Foreign Affairs* (1989); *Foreign Affairs and the US Constitution* (1990); and *International Law: Politics and Values* (1995).

Harold Hongju Koh is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School, and Dean-Designate of Yale Law School. He

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[1] Written consent of all parties to the filing of this brief is on file with the Clerk of the Court. This brief has not been authored in whole or in part by any counsel for a party. No person, other than the *amici curiae* and their counsel, has made any monetary contribution to the preparation or submission of this brief.

served as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998 to 2001. His numerous publications on the subjects of constitutional law and international law include *Deliberative Democracy and Human Rights*, with Ronald C. Slye (1999), and *The National Security Constitution* (1990).

Michael H. Posner is the Executive Director of Human Rights First (previously The Lawyers Committee for Human Rights). Since 1978, Human Rights First has been working in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law, particularly in the areas of political asylum law, international justice, refugee protection, and workers' rights. Mr. Posner has taught human rights at Yale and Columbia Law Schools and published widely on human rights.

SUMMARY OF ARGUMENT

The indefinite executive detention of U.S. citizen Jose Padilla on United States soil offends the rule of law and violates our constitutional traditions. Because we are said to be in a time of war, petitioner claims that the President has unilateral, unreviewable power to designate U.S. citizens as enemies of the state, to detain them indefinitely, and to determine their guilt without providing any of the guarantees of due process. At bottom, petitioner claims that a "war on terrorism" must necessarily be fought outside the constraints of the law. Even to invoke the rule of law, the Government suggests, is to belittle the magnitude of the threat facing our Nation.

The Government bases its actions on a radically broadened view of executive authority that is, in the

words of one judge below, "breathtaking in its sweep."[2] To accept the Government's position "would be effecting a sea change in the constitutional life of this country, and . . . would be making changes that have been unprecedented in civilized society."[3] In the Government's view, criminal charges, lawyers, and trials are neither "necessary or appropriate" when the Executive Branch decides to detain a U.S. citizen as an enemy combatant;[4] "different rules," which only the Executive may determine, "have to apply" when the threat of terrorism arises.[5]

The Government claims that those who would have this Court review its conduct toward U.S. citizens on U.S. soil "fundamentally misunderstand the nature of the threat this country is facing."[6] To ask federal judges to review the legality of a detention on a writ of habeas corpus, the Government says, is tantamount to the claim that "our judges—even though untrained in executing war plans—have a substantive role in the war decisions of the commander-in-chief."[7]

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[2] Transcript of Oral Argument in the Court of Appeals, Nov. 17, 2003, at 116:3 (Comment of Parker, J.), <http://news.findlaw.com/hdocs/docs/padilla/padrums111703trans.pdf>.

[3] *Id.* at 116:9-12.

[4] Alberto R. Gonzales, Counsel to the President, Remarks Before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), <http://www.abanet.org/natsecurity/judge_gonzales.pdf>.

[5] Donald Rumsfeld, Secretary of Defense, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004), <http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html>.

[6] Gonzales, *supra*.

[7] *Id.* The Executive would strip away the most basic due process rights of notice and an opportunity to be heard. Admiral Jacoby's chilling declaration, included in the record, claims that denying Padilla due process is essential to the Government's goal of extracting his full *(continued)*

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Throughout the history of this Republic, the Judiciary has adjudicated cases under the law, and in doing so has ensured the Executive's compliance with constitutional and statutory protections. However untrained the federal judiciary may be "in executing war plans,"[8] it is fully capable of interpreting the Constitution, domestic and international law, and articulating the legal principles that restrain executive overreaching in times of security threat.

In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court held that in time of undeclared war, the President lacks inherent authority to seize indefinitely the property of U.S. citizens in a manner contrary to a relevant federal statute. In this case, the court below held *a fortiori* that in time of undeclared war, the President may not invoke inherent constitutional authority to restrain indefinitely the *liberty* of U.S. citizens in a manner contrary to a relevant federal statute, the Nondetention Act of 1971, 18 U.S.C. § 4001(a).[9]

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intelligence value. Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, J.A. 80, 86 ("Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation .... Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship ... —even for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.... Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla").

[8] Gonzales, *supra*.

[9] *Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003) (citing 18 U.S.C. § 4001(a)).

The Constitution does not authorize the President to establish "different rules" to strip away the very freedoms that we espouse to the international community in the fight against terrorism. Petitioner seeks the unprecedented removal of a U.S. citizen on U.S. soil from *any* established legal regime, leaving him without the recognized rights of *either* a prisoner of war *or* a criminal defendant. This assertion of unfettered executive power lacks any support in the text and structure of the Constitution or in the precedents of this Court, and has no place in a society governed by the rule of law.

ARGUMENT

I.
THE EXECUTIVE IS CONSTRAINED BY LAW EVEN IN TIMES OF WAR.

A. The Constitution Does Not Confer Limitless Powers on the President Even in Times of War.

Ours is "a government of laws and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The Constitution establishes a Federal Government of limited, not plenary, powers. Accordingly, "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25 (1942). By also dividing power among the three branches, the Constitution authorizes each to act as a check on the others and ensures that the conduct of each will be constrained by law. As Madison explained, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 301 (1788) (James Madison) (Clinton Rossiter ed. 1961).

The existence of war or other armed conflict does not alter the fundamental structure of the Constitution or the constraints that it imposes on executive power. The U.S. Constitution contains no wartime or emergency exception to the scope of the President's powers.[10] Indeed, the word "war" appears nowhere in Article II of the Constitution. Instead, our constitutional text, structure, and history direct that the powers to conduct war and foreign affairs are not exclusive to the Executive, but rather are shared among all three branches of Government. *See* Louis Henkin, *Foreign Affairs and the US Constitution* 25-29 (2d ed. 2002); Harold Hongju Koh, *The National Security Constitution* 69-72 (1990).

The President is given the constitutional power to act as "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2. But Congress also has far-reaching authority over matters of war and national security. The Constitution provides that Congress has the power, among others, to "declare War . . . and make Rules concerning Captures on Land and Water," to "define and punish . . . Offences against the Law of Nations," to "raise and support Armies," to "provide and maintain a Navy," and to "make rules for the Government and Regulation of the land and naval Forces"; and Congress has the power to suspend the writ of habeas corpus in times of "Rebellion or Invasion." U.S. Const. art. I, §§ 8, 9. In addition, the Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the fore-

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[10] *Compare, e.g.*, Turkey Const. art. 15 (providing for suspension of fundamental rights, except right to life, in cases of emergency, wartime, or martial law). *See generally* Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 32 Israel Y.B. Hum. Rts. (2004), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=475583>.

going Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*" *Id.* art. I, § 8 (emphasis added).

The Judiciary also plays a critical role with respect to cases affecting national security and foreign affairs. Under Article III, "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made ... under their Authority." U.S. Const. art. III, § 2. Even for crimes directly implicating war and national security, the Constitution makes explicit that the Judiciary has a role in protecting individual liberties. *See id.* § 3 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court"). Ultimately, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions," not political ones. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

To be sure, the Commander-in-Chief Clause "puts the Nation's armed forces under Presidential command." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952); *see also The Federalist* No. 69, at 418 (Alexander Hamilton) (the President's designation as commander-in-chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy"). No less than the President's power as chief executive in civilian matters, however, the President's power as commander-in-chief of the armed forces is limited by law; it does not make him "Commander-in-Chief of the country," *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

The coordinate branches traditionally give due deference to the Executive in matters of national security and foreign affairs when the President acts within the scope of his proper discretion. Such deference, however, is largely based not on constitutional text, but on the perceived institutional competencies of the Executive: speed, military expertise, and the ability to provide a unified voice for the United States in foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936); Henkin, *supra*, at 41-42, 45-46; *The Federalist* No. 75, at 418 (Alexander Hamilton). Where those particular competencies are not directly implicated, and where a matter directly implicates the express powers of the coequal branches, the justification for deference to the Executive is diminished.[11]

Further, due deference must not be confused with unrestrained power, particularly in view of the specific war-related powers vested in the other branches by the very text of the Constitution. As this Court has held,

> It does not follow from the fact that the Executive has this range of discretion . . . that every sort of action . . . , no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established.

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[11] Petitioner cannot plausibly claim that the circumstances of this case invoke the unique institutional competencies of the presidency—speed, efficiency and unity—as they would be implicated, for example, by the President's control over military operations in the field. Here, the Executive has detained on U.S. soil a U.S. citizen whom the Executive declares to be an "enemy combatant," a novel term not found in international law. At the time of Padilla's designation, he was already being held in criminal detention pursuant to a material witness warrant. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).

Sterling, 287 U.S. at 400-01.[12]

Even in the conduct of war, the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). Indeed, the Constitution[13] and numerous federal statutes[14] contain several specific provisions designed expressly to address the balance between individual rights and public safety in times of "war," "rebellion or invasion," or "public danger."

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[12] In *Sterling*, the Court invoked established due process constraints on the power of the federal military to seize property in the course of waging war, as described in *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851), and *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1871).

[13] For example, Article I provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when *in Cases of Rebellion or Invasion* the public Safety may require it." U.S. Const. art. I, §9 (emphasis added). The Third Amendment provides that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, *nor in time of war, but in a manner to be prescribed by law.*" *Id.* amend. III (emphasis added). And the Fifth Amendment requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.*" *Id.* amend. V (emphasis added).

[14] *See, e.g.*, Alien Enemy Act, 50 U.S.C. §21 (declaring that "whenever there is a declared war between the United States and any foreign nation or government . . . ," citizens of "the hostile nation or government" who are not naturalized are subject to summary arrest, internment, and deportation, when the President so proclaims); Trading with the Enemy Act, 50 U.S.C. App. §§ 1-44 (enabling the President to regulate or prohibit commerce with any enemy state or its citizens after "Congress has declared . . . war or the existence of a state of war," *id.* § 2); Foreign Intelligence Surveillance Act of 1978, §§ 111, 309, 404, 50 U.S.C. §§ 1811, 1829, 1844 (permitting the President to authorize electronic surveillance, physical searches, or the use of pen registers for a period of fifteen days following a congressional declaration of war).

At a time when the Union had recently been torn apart by bloody civil war and much of the country remained under military occupation, this Court declared:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.* Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence.

Milligan, 71 U.S. (4 Wall.) at 120-21 (emphasis added). This Court should reject any attempt to read the Commander-in-Chief Clause as creating a blanket license to ignore individual rights in times of undeclared war.

B. This Court Has Recognized that the Law Applies in Times of War.

The Government misreads this Court's decisions as effectively freeing the President from any meaningful check during wartime. Time and again, in moments of national crisis, this Court has turned to law, not unfettered discretion, as the standard against which the President's action must be judged.

In *The Prize Cases*, 67 U.S. (2 Black) 635 (1863), decided at the height of the Civil War, the Court upheld the President's power to impose a naval blockade against the Confederate states. In reaching that conclusion, however, the Court nowhere suggested that the President's actions in times of war are unrestrained by law. Rather

than rely on the President's assertions that a war was in progress, the Court independently "enquire[d] whether, at the time this blockade was instituted, a state of war existed." *Id.* at 666.[15] The Court then examined whether the President was empowered to use military force, and found that power in *express congressional authorization* of a kind that is lacking here.[16] Significantly, the Court did *not* merely accept as true the Executive's representations as to the circumstances surrounding the capture of the vessels seized in the course of the blockade. Rather, the Court reviewed the executive seizure, looked to the testimony introduced below, and by applying to the facts the established international law of prize, decided to restore a portion of the seized property. *Id.* at 671-82.

While *The Prize Cases* dealt only with seized property, not with the executive detention of U.S. civilians in military custody, this Court addressed the latter issue three years later in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). The Government claimed that Milligan, like Padilla, was a U.S. citizen who had joined a subversive

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[15] Taking guidance from customary international law, the Court reached its own conclusion that on the facts, the insurrection in the Southern states met the criteria for a civil war. *The Prize Cases*, 67 U.S. (2 Black) at 667 (quoting 3 Emmerich de Vattel, *The Law of Nations* § 293 (1758) (Joseph Chitty ed. & trans. 1852)).

[16] The Court held that the President "has no power to initiate or declare a war either against a foreign nation or a domestic State. But *by the Acts of Congress* of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or the United States." *Id.* at 668 (emphasis added) (referencing ch. 36, 1 Stat. 424, and ch. 39, 2 Stat. 443). The Court further noted that Congress had ratified the President's actions in imposing the blockade, a well-accepted form of military force under international law. *Id.* at 669-71.

organization dedicated to attacking the United States.[17] There, as here, the President claimed that the existence of war and his role as commander-in-chief conferred upon him a reservoir of constitutional authority to detain citizens for trial by military commission.

In *Milligan*, unlike this case, Congress had authorized the suspension of the writ of habeas corpus, but only until the detained individual could be presented to the civilian courts for indictment and trial. The Government claimed that the President's commander-in-chief power gave him inherent authority to detain and try civilians, without regard to any limits that Congress may have placed upon that power. This Court rejected that claim, holding that the President "is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws." *Id.* at 121.

Echoing its claim here, the Government also urged this Court to defer broadly to its designation of Milligan as a prisoner to be held outside the civilian criminal system. *Id.* at 131. Rejecting any such blind deference, the Court substantively reexamined the designation the Government had placed on Milligan, concluding that Milligan was a civilian criminal defendant, accused of conspiring to wage unlawful war against the United States in concert with the enemy. *See id.* at 131 (dismissing notion that Milligan could be treated as prisoner of war). Even though Milligan's alleged crimes took place at a time when the Nation's very existence was imperiled, this Court found

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[17] *See Milligan*, 71 U.S. (4 Wall.) at 6-7 (statement of the case) (reciting accusations that Milligan had joined a subversive organization "for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communica tion with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, &c." between October 1863 and August 1864).

that the courts established by Congress were open and functioning, and that the President was thus required to turn Milligan over to the those courts for trial. *Id.* at 121-22.

Nearly a century after *Milligan*, *Youngstown* again recognized that the President cannot exercise military powers to curtail liberty or seize property without express and specific authorization by Congress. President Truman had ordered the seizure of the steel mills to prevent a work stoppage that he believed could impair the conduct of the undeclared war in Korea. The Court rejected the notion—offered again by the Government today—that the changing nature of modern warfare frees the President unilaterally to extend the powers of the military into the civilian life of the Nation. Finding irrelevant the cases cited by the Government "upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war," the Court held that

> *[e]ven though 'theater of war' be an expanding concept*, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. *This is a job for the Nation's lawmakers, not for its military authorities.*

Youngstown, 343 U.S. at 587 (emphasis added).

Even this Court's discredited ruling in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the wholesale detention and relocation of persons of Japanese ancestry from the western United States during World War II, did not authorize the President to detain U.S. citizens indefinitely on U.S. soil without congressional authorization. In *Korematsu*, the Court upheld a criminal conviction of an American citizen of Japanese origin, who was charged with remaining in California in violation of

an Act of Congress providing that no person "shall enter, remain in, leave, or commit any act in any military area or military zone . . . contrary to the restrictions applicable to any such area or zone. . . ." *Id.* at 216. But in *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court construed the same legislation as *not* authorizing the continued internment of the relocated individuals, to avoid the constitutional issue of whether such detention could ever satisfy the Due Process Clause. *Endo*, 323 U.S. at 303-04. On that basis, the Court ordered the petitioner in that case unconditionally released. *Id.*

Korematsu committed the grievous error of upholding a policy that "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting). But even there, this Court recognized limits on the President's power to curtail citizens' liberty in time of declared war. Such authority, the Court held, extended only so far as Congress had expressly authorized, and was subject to enforcement by ordinary judicial processes, not raw executive power.

Because *Milligan* and *Youngstown* cut so squarely against it, the Government rests its case almost entirely on *Ex parte Quirin*, 317 U.S. 1 (1942), which authorized the trial by military commission of German soldiers who had been captured within the United States as alleged saboteurs. Like *Korematsu*, *Quirin* is an aberrant case that was driven more by wartime haste and fear than by considered application of established constitutional principle.[18] But even accepting *Quirin* as precedent, for three

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[18] Subsequent revelations indicate that Attorney General Francis Biddle urged the President to set up and conduct the secret military trials in *Quirin* less to prevent disclosure of sensitive intelligence information than to avoid the embarrassment of public scrutiny of the *(continued)*

reasons it offers no support for the President's current claim of unchecked wartime detention authority.

First, in *Quirin*, the Court upheld the Government's detention authority explicitly because *Congress* had authorized the establishment of military commissions by statute. *Quirin*, 317 U.S. at 29.[19] In upholding the military trials, the Court relied on *Congress's* war powers under the Constitution, *id.* at 26-28, looked to *Congress's* intent to incorporate international law in defining the scope of the war powers, *id.* at 28, and expressly declined to decide whether the President would have the power to order such trials "without the support of Congressional legislation." *Id.* at 29.

Second, in *Quirin*, members of the armed forces of Nazi Germany (according to the conceded facts), who had landed in uniform in the United States and shed their uniforms allegedly to commit sabotage, were treated as "enemy combatants" and tried before a military commission. *Id.* at 21-22. But U.S. citizens in circumstances analogous to those of respondent Padilla—who had allegedly aided the sabotage plot in the U.S. but were not themselves members of the German army—were never held as "enemy combatants." Instead, they were treated as criminal defendants under U.S. domestic law and tried in ordinary civilian courts for crimes such as treason. *See,*

FBI's bungling of the case. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 66-67 (1996).

[19] Indeed, in two other sections of the statute not quoted by the Court, Congress had specifically authorized military commissions to try the crimes with which the commission defendants were charged. *See* Act of Aug. 29, 1916, ch. 418, §3, art. 82, 39 Stat. 619, 663 (authorizing "tri[al] by general court-martial or by a military commission"); *id.* art. 83 (authorizing "such ... punishment as a court-martial or military commission may direct"). *See generally* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1282-83, 1285-86 (2002).

e.g., Cramer v. United States, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943); Louis Fisher, *Nazi Saboteurs on Trial* 80-83 (2003).

Third, *Quirin* offers no support for the President's claim in this case that the Judiciary is incompetent to examine the allegations underlying the detention of an alleged enemy. The *Quirin* Court made no finding that it lacked jurisdiction to consider the lawfulness of the saboteurs' trial, that the legality of the detention was unreviewable, or that the accused saboteurs—whose status as enemy soldiers was conceded—could be detained or punished without due process. Instead, the *Quirin* Court accepted the concession that defendants were enemy soldiers, a status that Padilla contests in his case. The Court then reviewed the matter on the merits, and determined that the trial by military commission was lawful.

Similarly, in *In re Yamashita*, 327 U.S. 1 (1946), this Court upheld the war-crimes trial of a Japanese general before a U.S. military commission. As in *Quirin*, this Court found specific Congressional authorization of such a trial. *Id.* at 16. The Court analyzed the relevant international treaties to determine that the prisoner's alleged crimes fell within the jurisdiction of the military tribunal as defined by Act of Congress. *Id.* at 14-16. The majority and dissent fully agreed that, far from being unreviewable, the Court could review the legality of the trial. *See id.* at 8-9 (opinion of the Court); *id.* at 30 (Murphy, J., dissenting).[20]

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[20] *Johnson v. Eisentrager*, 339 U.S. 763 (1950), is not to the contrary. The Court in that case barred nonresident enemy aliens who were imprisoned overseas and who had been tried and convicted by military commissions overseas from access to U.S. courts for habeas purposes. *Id.* at 765-66. The status of the prisoners as enemy aliens—defined as "the subject of a foreign state at war with the United *(continued)*

In short, this Court has never accepted a claim as extreme as the Government makes here. The Executive has no *carte blanche*, in the name of undeclared war, to remove U.S. citizens on U.S. soil from the criminal justice system and to move them, based on untested allegation, into indefinite executive detention, without counsel, unreviewed by judicial authority, and unauthorized by law.

In *amici*'s experience, the Executive's rhetoric and practice evoke not so much our own Government's historical practices as those of dictatorial foreign governments that the U.S. State Department has traditionally condemned. Historically, in Latin American countries such as Chile in the 1970s and Peru and Colombia in the 1990s, in apartheid-era South Africa, and in China, Egypt, Iraq, and Malaysia, executive officials have claimed that a war against terrorism is too important to leave to the court system. They have declared states of siege or emergency, and suspended the legal order with grievous effect on the individual rights of their own citizens.[21]

States"—was not in question. *Id.* at 769 n.2. Nothing in *Eisentrager* addressed the circumstances of Padilla, a U.S. citizen being detained on U.S. soil, not a "subject of a foreign state at war with the United States." *See id.*

[21] *See, e.g.*, U.S. Dep't of State, *Human Rights Report on Malaysia, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27778.htm> (criticizing detention without charge or trial and interrogation without access to counsel); U.S. Dep't of State, *Human Rights Report on Egypt, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm> (criticizing prolonged detention and use of military tribunals to try terror suspects); *U.S. Dep't of State, Human Rights Report on the Philippines, 2003*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27786.htm> (criticizing arbitrary arrests); U.S. Dep't of State, *Human Rights Report on China, 2000*, at 743 (criticizing detention without charge); U.S. Dep't of State, *Human Rights Report on South Africa, 1985*, at 295-96 (criticizing prolonged detention of terror suspects without charge, trial, or access to courts, for preventive or interrogation purposes).

In this case, our own government is invoking an undeclared state of war to assert unreviewable discretionary power to detain, even over U.S. citizens on U.S. soil. Such sweeping assertions cannot be reconciled with our Nation's fundamental commitment to the rule of law.

C. The Law of War, As Defined by Applicable Statutes, Treaties, and Customary Law, Imposes Limits on Detention in Times of Armed Conflict.

Petitioner invokes the phrase "law of war" as a talisman for authority to detain those it labels "enemy combatants," while ignoring the obligations imposed by the law of war. The Government's attempt to hide unfettered Presidential discretion behind the "law of war" disregards the rule of law, misrepresents this Court's holdings, ignores history, and displaces the constitutional role of Congress and the courts.

The law of war comprises international treaties relating to armed conflict—principally the Geneva Conventions[22]—and the customary rules regarding such conflicts followed by nations out of a sense of legal obligation. Whenever the law of war has previously been invoked before this Court, the Court—after considering the applicable Acts of Congress—has looked to the established body of international treaties and customary international law governing the conduct of belligerents. *See, e.g., Quirin*, 317 U.S. at 11 ("From the very beginning

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[22] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals"); *see also Yamashita*, 327 U.S. at 14-16; *The Prize Cases*, 67 U.S. (2 Black) at 666-68.

The Geneva Conventions apply only in "international armed conflict," *i.e.*, a difference between state parties to the applicable treaties leading to the use of military force.[23] Under the law of war, anyone belonging to the armed forces of the enemy state or an organized allied militia of those forces, or a civilian taking a *direct* part in the hostilities, may be held by the military. However, persons so detained must be afforded substantial protections and may be held only for the duration of that conflict. *See* Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. These rights include the right to be granted, in the event that their status is contested, all the protections afforded prisoners of war "until such time as their status has been determined by a competent tribunal." *Id.* art. 5. Until the present situation, the United States has officially observed these Convention protections in every conflict in which it has engaged since World War II, including the Vietnam War and the first Gulf War

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[23] The instruments regulating "non-international armed conflict" (*i.e.*, conflicts that take place in the territory of a "High Contracting Party between its armed forces and dissident armed forces or other organized armed groups") do not recognize any authority to detain until the cessation of hostilities. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), 1125 U.N.T.S. 609. Instead, governments fighting insurgents must rely on domestic law authorizing and regulating detention. *See* Brief of *Amici Curiae* Practitioners and Specialists of the Law of War in Support of Respondent, at 16-17.

in 1991.[24] Petitioner asserts that the law of war applies to those it has labeled "enemy combatants," yet has refused to afford them the protections mandated by that body of law.[25]

The label "enemy combatant," which the Government has affixed to numerous detainees, merely describes a member of the armed forces of a country with which the United States is at war. *See Quirin*, 317 U.S. at 31. The Government's indiscriminate and novel use of that term to justify indefinite detention obfuscates the legal distinction between *privileged combatants*, such as soldiers in an army, who are entitled to protection under Article 4 of the Third Geneva Convention if captured, and *nonprivileged combatants*, who are subject to criminal punishment for their belligerent acts, such as the Nazi saboteurs in *Quirin*. *See* Third Geneva Convention, art. 4, 6 U.S.T. at 3316; *Quirin*, 317 U.S. at 31. The Government's loose usage of the "enemy combatant" label also overlooks the crucial distinction between actual *combatants* taking a *direct* part in hostilities, such as the members of the German army in *Quirin* or the Japanese general in *Yamashita*, and *civilians* who may be subject to criminal

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[24] *See generally* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696, at 9-13; U.S. Military Assistance Command, Vietnam, Directive No. 381-45, *Military Intelligence: Combined Screening of Detainees*, Annex A (Dec. 27, 1967), *reprinted in* Marco Sassoli & Antoine Bouvier, *How Does Law Protect in War?* 780-781 (1999); U.S. Army Judge Advocate General Corps, *Operational Law Handbook*, ch. 2 (T. Johnson & W. O'Brien eds. 2003), <http://www.jagcnet.army.mil/jagcnetinternet/homepages/ac/tjagsaweb.nsf/>.

[25] Nothing in the law permits the Executive to subject detainees to the burdens of the law of war without also granting them its benefits. As the Court remarked in *Milligan*, if a prisoner "cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?" 71 U.S. (4 Wall.) at 131.

trial in civilian courts for acts of espionage or treason in aid of an enemy power, such as Padilla, the *Quirin* saboteurs' co-conspirators, or the accused conspirator in *Milligan*. *Compare Yamashita*, 327 U.S. at 5, *and Quirin*, 317 U.S. at 21, *with, e.g., Cramer v. United States*, 325 U.S. 1, 3 (1945), *and Milligan*, 71 U.S. (4 Wall.) at 123.

Critically, the law of war gives the President no extra-constitutional authority to suspend—and effectively nullify—all of the constitutional limits on Executive actions against the liberty of citizens. Whenever the Government seeks to deprive a citizen of liberty, that citizen has a constitutional right to due process of law, including notice of the reasons why one is being held and an opportunity for a hearing on that issue under the criteria established by law. These constitutional protections cannot be avoided by claiming that authority to detain stems from the law of war. If, as petitioner alleges, Padilla is subject to the law of war, he must benefit from the protections that it provides as well as his constitutional rights as a U.S. citizen. *See, e.g.*, Third Geneva Convention, art. 5, 6 U.S.T. at 3316 (entitling detained alleged combatant to a hearing on his or her status before a "competent tribunal"); *see also Ex parte Endo*, 323 U.S. 283, 294-97 (1944) (ordering release of civilian held in executive detention during time of declared war).

By invoking the rhetoric of "law of war" and "enemy combatant," and resisting judicial scrutiny of the meaning and applicability of those terms, petitioner seeks to remove his prisoners from the protections of *any* recognized legal category—whether that of prisoner of war or of criminal pretrial detainee (civilian or military).[26]

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[26] Precisely the same principle is at stake in the related case, *Yaser Esam Hamdi, et al. v. Donald Rumsfeld, et al.*, No. 03-6696. Two primary bodies of law afford Hamdi rights in the circumstances of his case: the U.S. Constitution and federal laws of the United States; and *(continued)*

Petitioner argues that absolute executive discretion—not law—permits the indefinite incarceration of U.S. citizens on U.S. soil, without any meaningful judicial review. Such unchecked executive power over the liberty of individual citizens finds no support in our Constitution or legal tradition.

II.
THE EXECUTIVE'S DETENTION OF PADILLA IS UNLAWFUL.

Twenty-two months ago, the President abruptly declared Padilla an "enemy combatant"—a novel legal concept—and removed him from the criminal justice system. The President's action was tantamount to the summary issuance of an executive order stating:

> Notwithstanding any other provision of law, executive officials may indefinitely detain incommunicado, without charges, access to counsel, or due process of law, any American citizen stopped on U.S. soil whom they deem to be an "enemy combatant."

Apart from squarely violating the Nondetention Act of 1971, 18 U.S.C. § 4001(a), such an executive order would be at least triply unconstitutional: it would violate the constitutionally mandated separation of powers; it would unconstitutionally suspend the writ of habeas corpus without congressional action; and the total absence of

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the law of war as codified in the four Geneva Conventions, specifically the Third Geneva Convention, which relates to the treatment of prisoners of war. Yet in Hamdi's case, as in Padilla's, the Executive invokes the authority granted by both bodies of law, while accepting none of the constraints that limit the exercise of that authority. *See* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696; Brief of *Amici Curiae* Retired Federal Judges in Support of Petitioner, et al., *Hamdi v. Rumsfeld*, No. 03-6696.

procedural protections would offend the Due Process Clause of the Fifth Amendment.

By the Government's own account, Padilla is a native-born citizen of the United States. He is alleged to have conspired abroad with al-Qaeda, a terrorist organization, to commit terrorist acts in the United States at some undisclosed time in the future. Civilian law enforcement agents arrested Padilla, on process issued by the U.S. District Court for the Southern District of New York, as he arrived in Chicago unarmed on a commercial airline flight. The Government transferred Padilla from civilian to military custody, and moved him from the district, just days before the district court was to consider his continued detention. *Padilla v. Rumsfeld*, 352 F.3d 695, 700 (2d Cir. 2003).

Nothing in these facts suggests that Padilla is a "combatant" captured in an "armed conflict," as those terms are used in the law of war. He is not alleged to be a member of the military force of a foreign country, nor was he captured in the company of foreign armed forces or while directly engaged in combat. The allegations against him are classically criminal in nature and would support a prosecution under a host of federal statutes.[27] The

[27] *See, e.g.*, 18 U.S.C. § 831(a)(1), (8) (prohibiting conspiracy to disperse nuclear material or nuclear byproduct material in order to cause death, bodily injury, property damage, or environmental damage); *id.* § 2332a(a)(2), (b), (c)(2)(D) (prohibiting conspiracy to use weapons of mass destruction, defined to include "any weapon that is designed to release radiation or radioactivity at a level dangerous to human life"); *id.* § 2332(a)(1)-(2), (g)(1) (prohibiting conspiracy to commit "acts of terrorism transcending national boundaries," defined to include assault with a dangerous weapon where conduct occurs both inside and outside the United States); *id.* § 2332f(a)(1)-(2) (prohibiting conspiracy to bomb places of public use, government facilities, public transportation systems and infrastructure facilities); *id.* § 2339B (prohibiting conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda).

Government is fully entitled to treat Padilla as an accused terrorist and criminal defendant. What it may not do is label Padilla as a "combatant" in a "war" simply to justify his sustained incommunicado detention without trial. If this were permitted, nothing would prevent the Government from doing the same to an American citizen such as Timothy McVeigh, who could be removed without explanation from the criminal justice system and honored with the label of "soldier," when in truth he was a common criminal. Far from resting on the law of war, the Government's detention of Padilla dramatically distorts that law in an effort to expand and insulate from judicial review the asserted powers of the President.[28]

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[28] In contrast, Yaser Hamdi's circumstances place him within *both* the protections of the U.S. Constitution and the Geneva Convention protections for prisoners of war. The Government alleges that Hamdi was a soldier captured on the battlefield by the Northern Alliance while fighting on behalf of the Afghan military, and then later transferred to U.S. custody. Hamdi, like any U.S. citizen who finds himself in U.S. military custody abroad, is shielded from arbitrary executive action by the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

Even if Hamdi is being held under the law of war, his detention is patently illegal. The law of war, as expressed by the Third Geneva Convention, requires all detained combatants to be treated as prisoners of war "from the time they fall into the power of the enemy and until their final release and repatriation." Third Geneva Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140. Such status can be revoked only if a competent tribunal holds otherwise: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [requiring POW status], *such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*" *Id.*, 6 U.S.T. 3316, 3324, 75 U.N.T.S. 135, 142 (emphasis added). The Government's indefinite detention of Hamdi without the protections mandated by the

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Unlike the German soldiers in *Quirin* or the Japanese general in *Yamashita*, Padilla is not being tried for any crime. He is being detained without trial, formal charge, or even a status hearing. His recent meeting with counsel, which took place only after he had been detained for many months, was monitored and recorded. *See* Stevenson Swanson, *Padilla Gets to Talk with His Lawyers*, Chi. Trib., Mar. 4, 2004, at C1. In both *Quirin* and *Yamashita*, the accused were afforded more than a minimal degree of due process: they were allowed to confer with and be represented by counsel, to answer the charges against them, and to present evidence on their own behalf. *See Yamashita*, 327 U.S. at 5; *id.* at 32-33 (Murphy, J., dissenting); *Quirin*, 317 U.S. at 23. Padilla, however, has been held nearly incommunicado for almost two years without any fundamental protections. Until now, such protections have been routinely provided even to those accused of the most heinous crimes—including the enemy belligerents accused of war crimes in *Quirin* and *Yamashita* and citizens accused of acts of domestic terrorism, such as Timothy McVeigh. *See Yamashita*, 327 U.S. at 5, *Quirin*, 317 U.S. at 21; *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). The Government makes no pretense that Padilla is being held for trial; he is simply being detained without any stated time limit for the duration of a global "war on terrorism" that has no foreseeable end.[29]

Third Geneva Convention flies in the face of this unambiguous and settled process. *See generally* Brief of *Amici Curiae* Experts on the Law of War, *Hamdi v. Rumsfeld*, No. 03-6696.

[29] *See* Brief for the Petitioner 28 ("all enemy combatants are subject to capture and detention for the duration of an armed conflict"); *id.* at 33 (invoking "the option to detain until the cessation of hostilities"); *see also, e.g.*, U.S. Dep't of Defense, Fact Sheet, *Guantanamo Detainees*, Feb. 2004, <http://www.defenselink.mil/news/Feb2004/d20040220det.pdf> ("The law of armed conflict governs this war between the U.S. and al Qaida and ... permit[s] the U.S. to detain

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Padilla's case most closely resembles that of Milligan, the pro-Confederate conspirator accused of having plotted with a secret organization to conduct attacks against the United States. Like the federal courts in Indiana at the time of *Milligan*, the U.S. District Court for the Southern District of New York continues to "m[e]et [and] peacefully transact its business. It need[s] no bayonets to protect it, and require[s] no military aid to execute its judgments." *Milligan*, 71 U.S. (4 Wall.) at 122. This Court in *Milligan* correctly rejected the claim that military necessity supported the Executive's attempt to withdraw Milligan from the civilian justice system. That controlling precedent should foreclose the Government's current effort to create an alternative justice track for Padilla.

As respondents and other *amici* have fully argued, the facts of this case fit squarely within the third category of Justice Jackson's famous concurrence in *Youngstown*. The Government has not established that either the statutory Authorization for Use of Military Force (AUMF), Pub. L. No. 107-10, 115 Stat. 224, or various appropriations provisions specifically approved executive detentions, which

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enemy combatants without charges or trial for the duration of hostilities"); U.S. Dep't of Defense, Press Release No. 908-03, *DOD Announces Detainee Allowed Access To Lawyer* (Dec. 2, 2003), <http://www.defenselink.mil/releases/2003/nr20031202-0717.html> ("Under the law of war, enemy combatants may be detained until the end of hostilities"); U.S. Dep't of State, *Wolfowitz Says Jose Padilla Is "Where He Belongs,"* Wash. File, June 11, 2002, <http://usinfo.state.gov/topical/pol/terror/02061103.htm> (Padilla "is an enemy combatant who can be held for the duration of the conflict, according to Deputy Secretary of Defense Paul Wolfowitz"); Sgt. 1st Class Kathleen T. Rhem, *Intelligence, Not Prosecution, Is U.S. First Priority With Padilla* (June 2003), <http://www.defenselink.mil/news/Jun2002/n06112002_200206116.html> (quoting Secretary of Defense Rumsfeld) ("The United States is more interested in extracting intelligence information than in prosecuting Jose Padilla" and "[o]ur interest, really, in this case, is not law enforcement").

would place this matter in *Youngstown*'s first category, where the President's "authority is at its maximum." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Nor has Congress been silent, placing this matter in the "twilight zone" of *Youngstown*'s second category, where the President "and Congress may have concurrent authority or in which its distribution is uncertain." *Id.* at 637. Instead, as in *Youngstown* itself, an unambiguous statutory directive—here, the Nondetention Act's mandate that "[n]o citizen shall be . . . detained by the United States except pursuant to an act of Congress"[30]—places this case in Justice Jackson's third category, where "the President takes measures incompatible with the express . . . will of Congress, [and] his power is at its lowest ebb." *Id.* If the commander-in-chief power does not authorize the President to seize indefinitely American steel mills on American soil in times of undeclared war, how can it authorize him to seize indefinitely American *citizens* on American soil in times of undeclared war?

In *Kent v. Dulles*, 357 U.S. 116 (1958), this Court held that, even when foreign affairs are at issue, judges must find a clear statutory statement that Congress authorized the executive act in question before condoning an executive infringement on a citizen's liberty. Absent such a clear legislative statement, the Executive has no powers to withdraw rights from the individual. *See id.* at 128-30; *Ex parte Endo*, 323 U.S. 283, 299-301 (1944). Petitioner points to nothing close to a clear statement of legislative intent to authorize the military to detain United States citizens outside the law.

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[30] As *amici* Congressional Sponsors of Section 4001(a) in this case point out, that statute not only reflects constitutional limits on unauthorized executive detention of American citizens, but also rebuts any claim that congressional silence could be construed as acquiescence in that practice.

The AUMF does not even mention detention authority of the kind the Executive now asserts. Indeed, in the USA PATRIOT Act, enacted less than one month after the AUMF, Congress mandated that a suspected *alien* terrorist may not be detained for more than seven days without charging the alien with a criminal offense or commencing deportation proceedings. *See* 8 U.S.C. § 1226a(a)(5) (as added by USA PATRIOT Act, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351). The Act also expressly preserves the right of a detained suspected alien terrorist to seek judicial review of the merits of his or her detention by petition for a writ of habeas corpus. *Id.* § 1226a(b). The Government now asks this Court to believe that the same Congress that would not approve the detention of a suspected alien terrorist beyond a week without triggering statutory protections simultaneously and silently endorsed the indefinite detention on United States soil of United States *citizens* suspected of terrorism, based on claims of inherent presidential authority that this Court had squarely rejected in *Milligan* and *Youngstown*.

CONCLUSION

The horrific attacks of September 11, 2001 have tested this Nation's resolve. But September 11 did not suspend the Constitution, abrogate solemn treaty commitments, or repeal existing statutes. Nor did it give the President a reservoir of unreviewable power to evade domestic courts and indefinitely detain American citizens on American soil in the name of conducting undeclared wars abroad.

Even in times of war or armed conflict, ours is "a government of laws and not of men." The Constitution and the laws of the United States limit executive power and protect citizens such as Padilla from arbitrary deprivation of their liberty. If the Constitution and laws of the United States do not protect Padilla, they do not protect any of us. When the Executive exceeds the lawful boundaries of

even its wartime powers, it is the province and duty of this Court to reassert the rule of law and reaffirm the supremacy of the Constitution.

For the foregoing reasons, *amici* urge this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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April 12, 2004

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No. 03-1027

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Petitioner,

—v.—

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* ORIGINAL CONGRESSIONAL SPONSORS OF 18 U.S.C. § 4001(A) IN SUPPORT OF RESPONDENT

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April 12, 2004

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INTEREST OF *AMICI CURIAE*

Amici curiae, current and former Members of Congress, are original sponsors of 18 U.S.C. § 4001(a). They urge this Court to hold that the detention of José Padilla violates the provisions of that Act.[1]

The Hon. John Conyers, Jr. represents the 14th Congressional District of Michigan in the House of Representatives, where he serves as Ranking Member of the House Judiciary Committee. During the 92nd Congress, Congressman Conyers was a Member of Subcommittee 3 of the House Judiciary Committee. He was one of the original sponsors of § 4001(a).

The Hon. Robert F. Drinan represented the 3rd Congressional District of Massachusetts from 1971–1973 and the 4th Congressional District of Massachusetts from 1973–1981. During the 92nd Congress, Father Drinan was a Member of the House Committee on Internal Security and a Member of Subcommittee 3 of the House Judiciary Committee. He was one of the original sponsors of § 4001(a).

The Hon. Robert W. Kastenmeier, a World War II veteran, represented the 2nd Congressional District of Wisconsin in the House of Representatives from 1959–1991. In the 92nd Congress, Mr. Kastenmeier chaired Subcommittee 3 of the House Judiciary Committee and was a primary sponsor of § 4001(a). Mr. Kastenmeier submitted the Committee Report on H.R. 234, the bill later codified at § 4001(a).

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[1] Written consent of all parties to the filing of this brief is on file with the Clerk of the Court. This brief has not been authored in whole or in part by any counsel for a party. No person, other than *amici curiae* and their counsel, has made any monetary contribution to the preparation or submission of this brief.

The Hon. Abner Mikva, a World War II veteran, represented the 2nd Congressional District of Illinois from 1969–1973 and the 10th Congressional District of Illinois from 1975–1979. During the 92nd Congress, Judge Mikva served on Subcommittee 3 of the House Judiciary Committee and was a primary sponsor of § 4001(a). He was appointed to the U.S. Court of Appeals for the D.C. Circuit in 1979 and became Chief Judge in 1991, before stepping down in 1994.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises profound questions about the appropriate balance of power between the Legislature and the Executive regarding the detention of U.S. citizens. The Executive has detained José Padilla, a U.S. citizen, for almost two years, but it has yet to charge him with any crime. Originally arrested on May 8, 2002, Mr. Padilla was seized by civilian authorities inside the United States. On June 9, 2002, the President designated him an "enemy combatant" and ordered him transferred to a military prison in South Carolina. He has remained at that prison ever since. For most of those twenty-two months, Mr. Padilla has been held in complete isolation, barred from communicating with his lawyers, the court, or the outside world in any way. On March 3, 2004, he was allowed to meet with his lawyers for the first time in nearly two years.

On December 18, 2003, the U.S. Court of Appeals for the Second Circuit determined that Mr. Padilla's detention violates 18 U.S.C. § 4001(a), a federal statute governing the detention of U.S. citizens. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). Passed in 1971, §4001(a) directs that "no U.S. citizen" be detained

"except pursuant to an Act of Congress." The Act codifying § 4001(a) also repealed the Emergency Detention Act of 1950 (EDA), which had granted the Executive limited powers of preventive detention.

Section 4001(a) was an assertion of Legislative over Executive authority. Congress was determined to declare its own primacy in matters concerning the detention of U.S. citizens. As the legislative history makes clear, § 4001(a) was meant to proscribe the detention of U.S. citizens unless and until the power to do so was explicitly grounded in statute. In this, it did not matter whether the Executive acted pursuant to its military or civilian powers.

Amici respectfully request that this Court enforce the unequivocal mandate of § 4001(a). In the face of plain statutory language and clear legislative history, Mr. Padilla's detention cannot be upheld under U.S. law.

ARGUMENT

I. THE TEXT OF 18 U.S.C. § 4001(A) MAKES CLEAR THAT *NO* U.S. CITIZEN MAY BE DETAINED ABSENT STATUTORY AUTHORIZATION

In construing a statute, this Court begins "where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The words Congress employs must be interpreted " 'in accordance with [their] ordinary and natural meaning,' " unless otherwise defined in the statute. *Johnson v. United States*, 529 U.S. 694, 715 (2000) (Scalia, J. dissenting) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute

what it says there." *Conn. Nat'l Bank* v. *Germain,* 503 U.S. 249, 253-54 (1992).

The language of 18 U.S.C. § 4001(a) is simple, direct and unambiguous: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2000). In enacting these nineteen words, Congress made clear that *no* American citizen could be detained by the United States unless Congress had acted to authorize the detention. The words themselves admit no qualification or exception. No contrary definitions were provided, and no ambiguity exists in the language. Congress's words must be given their ordinary meaning.

This Court has emphasized that when the meaning of a statute is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In the face of unambiguous language, the "first canon [of statutory interpretation] is also the last: 'judicial inquiry is complete.' " *Conn. Nat'l Bank*, 503 U.S. at 253-54 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). "[P]arties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

This Court has already affirmed that § 4001(a) means precisely what it says. *See Howe v. Smith*, 452 U.S. 473 (1981). *Howe v. Smith*, the only Supreme Court case to construe the statute, held that § 4001(a) "proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Id.* at 479 n.3 (emphasis in original). This means that, unless Congress has enacted a statute specifically authorizing Mr. Padilla's detention, the detention is forbidden by law.

Despite this clarity of language, the government now argues that § 4001(a), properly construed, applies much more narrowly than its words direct. *See* Petitioner's Brief at 44-45. According to the government, § 4001(a) does not apply to—and was not intended to apply to—the military's detention of U.S. citizens during wartime.[2] *Id.* Nothing in the statute's text suggests any such limitation, however. On the contrary, the language of § 4001(a) is unequivocal and straightforward in its reach: "*No* citizen" shall be detained "*unless* pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (emphases added).

II. CONGRESS SOUGHT TO PROHIBIT THE CIVILIAN OR *MILITARY* DETENTION OF ANY U.S. CITIZEN ABSENT *EXPLICIT* STATUTORY AUTHORIZATION

This ordinary understanding of the statute's language is fully supported by its legislative history. The legislative history of § 4001(a) makes clear that Congress intended to ensure that no U.S. citizen could be detained without an explicit statutory basis. In this, it did not matter whether the President acted under his military or civilian powers. Congress's intent in enacting H.R. 234—the bill now codified at § 4001(a)—is amply reflected in the Committee Report on the bill, the contemporaneous statements of its sponsors, and the debates on the House and Senate floors.[3] *See* H.R. 234, 92d Cong. (1971).

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[2] The government's argument that the court of appeals' reading of § 4001(a) would preclude the battlefield detention of U.S. citizens, *see* Petitioner's Brief at 48, is addressed below at note 6.

[3] This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Garcia v. United States*, 469 U.S. 70, 76 (1984)

A. Congress Realized That Under *The Steel Seizure Case*, Mere Repeal Of The EDA Would Be Insufficient To Achieve This Goal.

The Committee Report on the bill, submitted by the House Committee on the Judiciary, reveals that the purpose of H.R. 234 was "twofold." *See* H.R. REP. NO. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435 ("House Report"). Its first purpose was: "(1) to restrict the imprisonment or other detention of citizens of the United States to situations in which statutory authority for their incarceration exists. . . ." *Id.* Its second purpose was: "(2) to repeal the Emergency Detention Act of 1950," 50 U.S.C. §§ 811-26 (repealed 1971), Title II of the Internal Security Act of 1950, which had granted the Executive limited powers of preventive detention at the outbreak of the Korean War. H.R. REP. NO. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1435-36; *see also infra* Section III.A. The legislative history of H.R. 234 reveals that Congress's second purpose, the repeal of the EDA, provided the impetus behind what was to become its larger first purpose—asserting broad congressional control over the detention of U.S. citizens.

The 92nd Congress acted to repeal the EDA in 1971 out of concern that its scheme of preventive detention was subject to "grave" constitutional challenge. H.R. REP. NO. 92-116, at 4, *reprinted in* 1971 U.S.C.C.A.N. at 1438. But the EDA, whatever its inadequacies, had at least established some affirmative limitations on preventive detention by the Executive Branch. *See infra*

(alteration in original) (citation omitted). The Court has also held that the "remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *see also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements "deserve[ ] to be accorded substantial weight . . .").

Section III.B. The Judiciary Committee worried that repeal, standing alone, might leave the field unoccupied and free the Executive of all restraint.

> [T]he Committee believes that it is not enough merely to repeal the Detention Act. The Act, concededly can be viewed as not merely as an authorization for but also in some respects as a restriction on detention. Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation on the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950.

H.R. REP. NO. 92-116, at 5, *reprinted in* 1971 U.S.C.C.A.N. at 1438.

Unwilling to turn back the clock, given the detention experiences of World War II, the Judiciary Committee added an amendment—the Railsback Amendment—which set forth the language now codified at § 4001(a). "The Committee believes that the imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists." *Id.*

Ironically, the sponsors of H.R. 234 were first alerted to the implications of simple repeal by Congressman Ichord, Chair of the House Committee on Internal Security and the leading opponent of the Railsback Amendment. The Committee on Internal Security had proposed H.R. 19163 (later H.R. 820 in the 92nd Congress), a rival bill that sought to amend, rather than repeal the EDA. *See* H.R. 19163, 91st Cong. (1970). This bill would have retained the EDA's preventive detention scheme, while incorporating additional procedural protections.

In the House Report on H.R. 19163, Congressman Ichord warned his fellow representatives that simple

repeal might grant even more power to the Executive. *See* H.R. REP. NO. 91-1599, at 12 (1970). He reminded his colleagues

> of the unfortunate occurrence during World War II when the President, in the exercise of his war powers and without congressional restraint, detained persons of Japanese ancestry on a group basis without regard to their status as American citizens and without regard to the question of individual loyalty, an action which in our opinion, at least in hindsight, must be regarded as a dark day in our history. Surely, a consideration of the fact that a repeal of the act removes all restraints on the Executive and would return us to the status existing in World War II should give us pause.

Id. Congressman Ichord reemphasized these points during the floor debate on H.R. 234 and suggested that his proposal to amend the EDA was therefore more "libertarian" than a proposal for outright repeal. 117 CONG. REC. 31,546 (1971). He also noted that it was only after he raised these issues that the House Judiciary Committee "went to work and they came up with the Railsback Amendment." *Id.*

Congressman Railsback described the genesis of his Amendment in similar terms. During the Judiciary Committee hearings, "it became apparent that what was said in the Internal Security report might be true." *Id.* at 31,549. The sponsors on the Judiciary Committee realized that with repeal alone,

> we would not be correcting what happened in the year 1942 when the citizens were rounded up . . . .
>
> . . . [T]he Committee on the Judiciary felt that it would be wise not only to repeal title II but to try to do something about what occurred in 1942 through

> President Roosevelt's Executive Order. So we came up with an amendment that says:
>
> > No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
>
> In other words, an Executive has to have some kind of congressional authorization before he can detain a citizen.

Id. at 31,549-50.

This analysis of simple repeal, by opponents and sponsors of H.R. 234 alike, was informed by their careful consideration of this Court's decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). As the Report of the Committee on Internal Security noted:

> [The *Youngstown*] decision teaches that where the Congress has acted on a subject within its jurisdiction, sets forth its policy, and asserts its authority, the President might not thereafter act in a contrary manner . . . .
>
> The question then is whether Congress shall express itself upon this subject, or whether it shall wipe the slate clean of such restraints as are now imposed on the executive power by the Emergency Detention Act of 1950.

Id. at 31,551 (quoting the Internal Security Report) (alteration in original).

Although the Committee on Internal Security had raised this question in connection with its own bill to amend the EDA, Congressman Railsback quoted back this language during the floor debate in support of his own Amendment. *See id.* He did so to emphasize that Congress did have the authority under *Youngstown* to

affirmatively prohibit Executive detention in wartime without the "prior consent of the Congress":

> To those who would view such a prohibition as in derogation of the Executive's wartime powers, I would refer them to the *Youngstown* steel seizure cases—343 U.S.C. [sic] 579—where the Supreme Court indicated even though a President might have broad wartime powers, they may be limited by acts of Congress.

Id. Given that the sponsors of H.R. 234 had determined that "[n]either modification nor repeal" of the EDA could "remove what amounts to a national disgrace," Congressman Railsback urged his fellow Members to enact the broad affirmative prohibition provided for in H.R. 234. *Id.* They did so on September 16, 1971, by a vote of 356-49.[4] *Id.* at 31,781.

B. Congress Endorsed The Broad Scope Of The Railsback Amendment And Understood Its Reach To Include Military Detentions In Wartime.

The language of the Railsback Amendment was debated extensively on the House floor, and the exchanges between the sponsors and opponents of H.R. 234 illustrate a Congress fully aware of the implications of the language used. Contrary to the government's position, Congress understood that the language of the proposed amendment was to apply to the military detention of citizens during wartime.

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[4] The Senate adopted the Railsback Amendment on September 16, 1971. Just before the measure came up for a vote, Senator Daniel Inouye, the primary sponsor of the Senate's companion bill to H.R. 234, urged his fellow Senators to vote for the language of the Railsback Amendment, characterizing the provision as "a valuable addition to my bill." 117 CONG. REC. 32,145 (1971).

Congressman Ichord led the fight against the Railsback Amendment, which he termed "this most dangerous committee amendment." *Id.* at 31,544. On the House floor, he warned that the Railsback Amendment

> would deny to the President the means of executing his constitutional duties, and could have the effect of rendering him helpless to cope with the depredations of those hard-core revolutionaries in our midst who, in the event of war, may be reasonably expected to attempt a widespread campaign of sabotage and bloodletting, including the assassination of public officials, in aid of the enemy.

Id.[5]

Congressman Ichord pressed Congressman Railsback on this point, asking whether the sponsors of H.R. 234 would really deny the President the authority to preventively detain U.S. citizens in wartime. The following exchange—in which Congressman Railsback emphasized that the President had other means at his disposal—illustrates that Congress fully explored the ramifications of the Railsback Amendment:

> Mr. ICHORD: . . . Does the gentleman believe that in this country today there are people who are skilled in espionage and sabotage that might pose a possible threat to this Nation in the event of a war with nations of which those people are nationals or citizens?

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[5] Congressman Williams, another opponent of the Railsback Amendment, cautioned his colleagues in similar terms:

> . . . I do not want to see the President's hands tied by the language of the Kastenmeier subcommittee proposal which would require an act of Congress before any likely subversive or would-be saboteur could be detained.

Id. at 31,544.

Mr. RAILSBACK: Yes.

Mr. ICHORD: Does the gentleman believe then that if we were to become engaged in a war with the country of those nationals, that we would permit those people to run at large without apprehending them, and wait until after the sabotage is committed?

Mr. RAILSBACK: I think what would happen is what J. Edgar Hoover thought could have happened when he opposed [the detention of Japanese-Americans] in 1942. He suggested that the FBI would have under surveillance those people in question and those persons they had probable cause to think would commit such actions.

Id. at 31,551-52.[6]

[6] In addition to arguing that there were means other than preventive detention at the Executive's disposal, the sponsors of § 4001(a) emphasized that the Railsback Amendment did not (and could not) impinge on the President's inherent powers, *if* the President had any inherent power to detain U.S. citizens. Congressman Abner Mikva noted, "If there is any inherent power of the President . . . to authorize the detention of any citizen of the United States, nothing in the House bill that is currently before this Congress interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President." *Id.* at 31,555.

In its brief, the government argues that the Second Circuit's construction of § 4001(a) raises "serious constitutional questions" as it "would preclude the military's detention even of an American citizen seized while fighting for the enemy in the heat of traditional battlefield combat." Petitioner's Brief at 48. Even if the government was correct, however, these facts are not presented by this case. Mr. Padilla was not seized on a "traditional battlefield," foreign or domestic. He was arrested by civilian authorities at Chicago's O'Hare Airport. The military became involved a month later, when military personnel seized Mr. Padilla from his civilian jail cell in New York, and transferred him to a military brig.

Congressman Ichord also denounced the Railsback Amendment as impractical, arguing that Congress might not be able to move quickly enough in times of crisis:

> But this is the nuclear age. We cannot expect an enemy to hold to the ancient etiquette of war by making formal declarations before undertaking their attack. In this nuclear age we should not expect to be forewarned. Nor is it likely that Congress will be able to sit. If it cannot sit, it cannot legislate. Under no circumstances, therefore, can we afford the luxury of an amendment, which is so clearly unwise, unnecessary, and dangerous.

Id. at 31,545.

The sponsors of H.R. 234 pushed back. Congressman Mikva, one of its primary sponsors, stated that in his view, the EDA was "an unwarranted delegation of unnecessary power" to the President. *Id.* at 31,566. He emphasized that in a future crisis, he would rather "leave it to the Congress to judge under what circumstances an American citizen should be detained." *Id.* He explained to his fellow Members:

> By repealing the statute, Congress would terminate the President's ability to incarcerate people whenever he determines that an emergency exists. It would be Congress['s] responsibility to restore that power to the President if necessary, along with whatever other emergency powers he might require, in the event that Congress found a state of emergency to exist. It is difficult to envision a situation in which the President would need this particular kind of authority on an emergency basis without even the 24 hour notice which would be necessary for Congress to act.

Id. at 31,557.

Contrary to Congressman Ichord's assertions, Congressman Railsback explained that H.R. 234 would not prevent the President from acting in a situation of martial law—at a time when the "processes of government cannot function in an orderly way." *Id.* at 31,755. He emphasized that the Supreme Court had explicitly "noted this exception in *Ex parte Milligan*," a Civil War case holding that civilians may not be tried by military tribunal unless the civilian courts are closed and obstructed under the proper application of martial law. *See* 71 U.S. (4 Wall.) 2, 127 (1866) (noting that "[m]artial rule can never exist where the courts are open" and "capable of administer[ing] criminal justice according to law"). Congressman Railsback explained that, as long as Congress and the courts were able to function, Congress could properly limit the Executive's military detention authority under *Youngstown* and under "article I, section 8 of the Constitution." 117 CONG. REC. 31,755 (1971).

Thus, Congress understood the language of § 4001(a) to generally include (and to bar) military detention of U.S. citizens in wartime. That understanding is made even more explicit elsewhere in the legislative history. For example, in emphasizing that his Amendment sought to prevent the recurrence of World War II detentions, Congressman Railsback noted that Japanese-Americans were held "under the 1942 Executive order, which incidentally delegated authority to the military instead of civilians to execute the order." *Id.* at 31,552. Congressman Ichord—in condemning the World War II detentions—explained that President Roosevelt had issued Executive Order 9066 under his Commander-in-Chief powers, and had delegated authority under the Order to "the Secretary of War and the military commanders who

he may from time to time designate."[7] H.R. REP. NO. 91-1599, at 8.

Ignoring this legislative history, the government argues that Congress did not intend for § 4001(a) to apply to military detentions, because the detention of Japanese-Americans was "administered by a civilian agency, the War Relocation Authority, *not by the military*." Petitioner's Brief at 46 (emphasis in original). Although it is true that the civilian War Relocation Authority (WRA) was created to administer the relocation centers,[8] the restrictive powers of the WRA were delegated to it by Lt. General John De Witt, Military Commander of the Western Defense Command. *See Ex parte Endo*, 323 U.S. 283, 289 (1944). As the official designate of the Secretary of War, General De Witt was responsible for carrying out the duties prescribed by Executive Order 9066. *Id.* at 286. It was General De Witt who issued the orders that prevented evacuees from leaving the relocation centers. *See id.* at 289 (noting that General De Witt promulgated a series of restrictive

[7] The authority for the World War II detentions stemmed from Executive Order No. 9066, issued on February 19, 1942. *See Ex parte Endo*, 323 U.S. 283, 285-98 (1944).

[8] The Director of the War Relocation Authority explained that it "was established for the primary purpose of relieving military establishments of the burden of providing for the relocation of persons excluded from military areas by order of the Secretary of War or by designated military commanders acting pursuant to Executive Order No. 9066, dated February 19, 1942." *See War Relocation Centers: Hearing on S. 444 Before Subcomm. of Senate Comm. on Military Affairs*, 78th Cong. 61 (1943) [hereinafter *War Relocation Hearings*] (testimony of Dillon S. Myer, Director of the War Relocation Authority). The relocation centers were set up only after "it was found necessary to take care of these people who were moved out [of military exclusion zones], until we could work out another program for them." *Id.* at 47.

orders prohibiting the evacuees from leaving relocation centers "except pursuant to an authorization from General De Witt's headquarters"). "By letter of August 11, 1942, General De Witt authorized the War Relocation Authority to issue permits for persons to leave these areas. By virtue of that delegation . . . the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers." *Id.* at 290.

Even then, the military continued to play an important role with respect to the relocation centers. The perimeters of the centers were patrolled not by civilian officials, but by Army soldiers, who checked "the passes of people going in and of people coming out." *War Relocation Hearings, supra*, at 6 (1943) (testimony of Dillon S. Myer, Director of the WRA). And during any internal disturbance, it was understood that "the military police [were] called in by the director [of the WRA] and given full charge during that period of disturbance." *Id.*

Furthermore, not all Japanese-Americans were held at relocation centers. Some were detained at domestic "internment camps," which were run by the Army. *Id.* at 39. Any person of Japanese descent (combatant or civilian) who was determined to be disloyal was transferred from a relocation center to an Army internment camp, where he or she was held for the duration of the conflict.[9] *Id.* Although the Army interned non-citizens without prior judicial procedure, U.S. citizens could be interned in these Army camps if (and only if) they were "proven subversive on being put through the court procedure, but only through that process." *Id.* at 40. Thus,

[9] In his Senate testimony, Director Myer emphasized that "prisoners of war" and "proven enemies" were held in Army internment camps, not WRA relocation centers. *Id.* at 45.

contrary to the government's arguments, it simply cannot be maintained that the detention of Japanese-Americans in World War II was "administered by civilian authority," to the exclusion of the military.

And of course, Members of Congress understood that the EDA itself had been enacted to cope with the threat of domestic espionage and sabotage during a "war-related emergency." H.R. REP. NO. 91-1599, at 4. The EDA was passed at the outbreak of the Korean War in response to fears that dissident American Communists might seek to sabotage the war effort at home. *See infra* Section III.A. The EDA operated both as an authorization for and restriction upon the preventive detention of U.S. citizens. *See* H.R. REP. NO. 92-116, at 2-3, *reprinted in* 1971 U.S.C.C.A.N. at 1436. The Executive could detain citizens under the Act only pursuant to warrants issued by the Attorney General and only if there was "reasonable ground to believe" that the suspects might engage in acts of sabotage or espionage. 50 U.S.C. § 813(a) (1970). Any suspect so detained had the right to administrative and judicial review of the Attorney General's decision. *See id.* §§ 814-21; *see also infra* Section III.B.

Seeking to create a distinction between military and civilian detention where none exists, the government emphasizes that the EDA delegated detention authority to a "civilian official." Petitioner's Brief at 46. Although it is true that the EDA authorized the President to "act[ ] through the Attorney General," 50 U.S.C. § 813(a), the Executive could not have sidestepped the EDA's procedural requirements by ordering that citizens be detained under military, rather than civilian authority. The EDA was intended to regulate preventive detention and limit Executive discretion. *See, e.g.*, Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27

W. POL. Q. 395, 396 (1974) ("At a minimum, the [EDA] presumed that short of the invocation of martial law, the use of unfettered discretion by the President in a wartime emergency had died with World War II.").[10] By directing that the Executive act "through the Attorney General," the EDA in effect barred the preventive detention of U.S. citizens by the military.

C. Congress Intended To Proscribe Any Detention Of A U.S. Citizen Not Explicitly Grounded In Statute.

Congress did not believe that a general statute—one that did not explicitly confer detention authority on the Executive—would be enough to satisfy the demanding language of the Railsback Amendment. The evolution of that language makes clear that the sponsors of H.R. 234 envisioned that any enabling statute would have to deal specifically with the Executive's authority to detain.

Initially, the language of H.R. 234 provided that no one could be imprisoned or detained except in conformity with the provisions of Title 18 of the U.S. Code. During the Subcommittee hearing on the bill, however, Robert Mardian, appearing on behalf of the Department of Justice, pointed out that this falsely "assume[d] that all provisions for the detention of convicted persons are contained in title 18." *Prohibiting Detention Camps: Hearings on H.R. 234 and Related Bills Before Subcomm. 3 of the House Comm. On the Judiciary*, 92d

[10] The EDA was "the brainchild of a group of beleaguered liberal senators caught in a rising wave of intense anticommunism," who had been offended by "the dragnet procedures of 1942" and considered the EDA "an improvement." Longaker, *supra*, at 395-96 (1974). In the debates on H.R. 234, Congressman Ichord emphasized that the EDA had been introduced by Senators whose "libertarian credentials" no-one could question. *See* 117 CONG. REC. 31,542 (1971).

Cong. 73 (1971) [hereinafter *H.R. 234 Hearings*] (statement of Robert Mardian, Assistant Attorney General, Internal Security Division, DOJ). Mr. Mardian emphasized that other titles of the U.S. Code also contained detention provisions, and that H.R. 234, as written, might unintentionally suggest that Congress wanted to repeal all those other provisions. *Id.* at 76.[11]

The Subcommittee considered various solutions to this problem, including the possibility of enumerating all such titles within the text of H.R. 234.[12] But Congressman Railsback devised a simpler solution, and Subcommittee 3 amended H.R. 234 with the broader language of

[11] For example, the following exchange occurred:

> Mr. MIKVA: The gentleman is correct that presently they are scattered. Would not the Department's concern though, be allayed if sections 1 and 2 were amended to require conforming with the procedure specified in this title, title 21, title 50, and so forth?
>
> Mr. MARDIAN: I am not convinced that we have all the titles.
>
> Mr. CONYERS: I am not either.
>
> Mr. MIKVA: But you understand it was not a procedure concern.
>
> Mr. MARDIAN: I think that is clear. I don't think there was any intention to repeal the authority of the Government or the President to commit people convicted of crimes other than those contained in title 18.
>
> Mr. CONYERS: I am glad to hear the gentleman make that statement for the record.

H.R. 234 Hearings, *supra*, at 76.

[12] Among the provisions unintentionally excluded by the original language of H.R. 234 were those that provided for circumstances in which the *military* could detain and try a U.S. citizen accused of spying. *See* 10 U.S.C. §§ 906–906(a). Mr. Mardian's intervention ensured this did not happen, preserving detention authority for the military and further undermining the government's claim that § 4001(a) was not intended to cover military detentions. *See supra* Section II.B.

his proposal. At no point did any of the sponsors suggest that the Railsback Amendment might expand the permissible range of enabling statutes beyond those dealing specifically with detention.

But this possibility was raised—and discounted—on the House floor. In a particularly telling exchange, Congressman John Ashbrook, a supporter of the rival bill, H.R. 820, claimed that the Railsback Amendment, although meant to restrict Executive authority, would actually "open up the President's power." 117 CONG. REC. 31,547 (1971). He warned his colleagues that Congress had already enacted "many statutes" authorizing the President to declare a national emergency, and suggested that in such an emergency, the President might seek to carry out preventive detentions using this general statutory authority. *Id.* He emphasized:

> I, for one, would feel very much better if all of the written restraints in H.R. 820 were on the books, operating to restrain the President, operating to prevent the President from the abuse of power under a declaration of national emergency . . . .
>
> . . . [With the Railsback Amendment,] [e]very declaration of emergency, I say to my fellow Members here, would come from an act of the Congress which would be the enabling act and which would give the President the precise power that we are here trying to check.

Id. at 31,548.

No other Member of Congress supported this analysis, however. Congressman Ichord, the primary sponsor of H.R. 820, took pains to contradict Congressman Ashbrook on this point:

> Madam Chairman, I would say to the gentleman from Ohio [Mr. Ashbrook] that I do not entirely

> agree with the gentleman. I do feel that the language of the amendment drafted by the gentleman from Illinois [Mr. Railsback] would prohibit even the picking up, at the time of a declared war, at the time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage.

Id. at 31,549. But Congressman Ashbrook went on to suggest that the Railsback Amendment granted no more protections to U.S. citizens than had been available to Japanese-Americans during internment. Congressman Railsback ended the exchange by making clear that this was the whole point of his Amendment:

> Mr. ASHBROOK: . . . I would certainly point out to my friend, the gentleman from Illinois, the right to a trial by jury is not new. It was available to those people in 1941 and 1942. The only exception was that they did not get it.
>
> Mr. RAILSBACK: That is right; they did not get their constitutional rights.
>
> Mr. ASHBROOK: There is no guarantee. From what the gentleman is saying, he thinks there would be these guarantees in the future. The same laws were on the books. The same Constitution was operating. They did not get it. How can he say they would get it now?
>
> Mr. RAILSBACK: Because we are saying in here that detention cannot occur unless pursuant to an act of Congress.

Id. at 31,552. Following on this discussion, Congressman Robert Eckhardt, a supporter of H.R. 234, emphasized to his colleagues that contrary to Congressman Ashbrook's remarks: "You have got to have an act of

Congress to detain, and that act of Congress must authorize detention . . . ." *Id.* at 31,555.[13]

III. THE PROTECTIONS AFFORDED MR. PADILLA FALL FAR SHORT OF PROTECTIONS ONCE AVAILABLE UNDER THE EDA

Despite the plain language and clear legislative history of § 4001(a), Mr. Padilla has already been held in preventive detention for nearly two years. In that time, the Executive has denied him the most basic of procedural protections. The conditions of Mr. Padilla's confinement fall far short of the protections that were once available under the EDA, the statute repealed in 1971 for procedural inadequacies.

A. Congress Repealed The EDA Over Concerns About Its Due Process Failings.

The EDA, enacted as Title II of the Internal Security Act of 1950, "established procedures for the apprehension and detention, during internal security emergencies,

[13] As noted in the court of appeals' opinion, however, the plain language of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), "contains no language authorizing detention," particularly "the detention of American citizens captured on United States soil." *Padilla*, 352 F.3d at 722. In addition, 10 U.S.C. § 956(5), a commonplace appropriations statute, authorizes "nothing beyond the expenditure of money," and is therefore insufficient both under § 4001(a) and *Ex parte Endo*, 323 U.S. at 304 n. 24. *See Padilla*, 352 F.3d at 724. In *Ex parte Endo*, this Court held that an appropriations statute must contain language "plainly" authorizing the precise authority claimed. 323 U.S. at 304 n. 24. There is no such language here.

The government's interpretation of § 956(5) would have rendered § 4001(a) moot *ab initio*. Similar language appeared in a World War II appropriations statute used to fund the detention of Japanese-Americans, *see* Military Appropriation Act, 77th Cong., ch. 591, tit. III, § 103, 55 Stat. 810, 813-14 (Dec. 17, 1941). Given that § 4001(a) was meant to bar a recurrence of World War II preventive detention, the 92nd Congress clearly did not mean for the old but surviving appropriations language to constitute explicit authorization under § 4001(a).

of individuals deemed likely to engage in espionage or sabotage," if there was "reasonable ground to believe" that they would "probably" do so. *See* 50 U.S.C. § 813 (1970) (repealed 1971). Congressman Spark Matsunaga, a primary sponsor of § 4001(a), explained that Congress enacted the EDA over President Truman's veto "in the then prevalent atmosphere of the Korean conflict, when being 'soft on communism' was thought by many to be treasonable." 117 CONG. REC. 31,571 (1971). Congressman Chet Holifield, another sponsor of § 4001(a), emphasized that the EDA was "passed during a time of great national hysteria and uncertainty":

> We heard wild accusations of Communists in Government, and witnessed spectacular trials of members of the Communist Party, espionage agents, and conspirators. The terms "fifth column," "fellow traveler," and "soft on communism" filled every newspaper and broadcast. Any Congressman or public official who spoke in defense of basic human or constitutional rights was labeled a Communist sympathizer.

Id. at 31,566.

According to Congressman Matsunaga, the EDA was "more or less forgotten" as the "hysteria of anticommunism of the early 1950's" began to wane. *Id.* at 31,572. It was forgotten, that is, until "about 3 years ago [in 1968]," when "rumors were rampant that the Government was again preparing detention camps . . . for dissidents, activists, militants, and others with whom those in control of the Government might disagree." *Id.* Congressman Mikva explained that these rumors had been sparked by a "1968 report of the House Committee on Un-American Activities (now House Internal Security Committee)," which "recommended using the detention camps provided for by Title II" for certain black nation-

alists and Communists. *H.R. 234 Hearings*, *supra*, at 42; *see also* 117 CONG. REC. 32,144 (1971).

As the House Report reveals, the EDA had become a profound concern for Congress by 1971:

> Although no President has ever used or attempted to use these provisions, the mere continued existence of the Emergency Detention Act has aroused much concern among American citizens, lest the Detention Act become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs or views.

H.R. REP. NO. 92-116, at 2, *reprinted in* 1971 U.S.C.C.A.N. at 1436. In response to these concerns, the House Committee on Internal Security wanted to amend, rather than repeal the EDA. *Id.* But "more than 157 Members of the House" sponsored or cosponsored bills calling for outright repeal. *Id.*

In unanimously endorsing H.R. 234, the House Judiciary Committee determined that the EDA was "beyond salvaging, [could] not be adequately amended, and should be repealed in toto." *Id.* at 1438. Its members concluded that the Act served "no useful purpose," but only "engender[ed] fears and resentment on the part of many of our fellow citizens." *Id.* at 1437. They also emphasized that its scheme of preventive detention was subject to "grave" constitutional challenge, in large part because of "inadequate" judicial review and other due process failings. *Id.* at 1438.

In advocating for the repeal of the EDA, the sponsors of H.R. 234 highlighted the EDA's glaring procedural deficiencies. Congressman Railsback warned that the EDA raised "serious constitutional questions." 117 CONG. REC. 31,550 (1971).

> The person detained is not brought before an impartial judge but before a "preliminary hearing officer" appointed by the prosecution. . . .
>
> And how, under such procedures, does a detainee prove his innocence. How does he defend the vague charge that someone believes he will commit a criminal act sometime in the future?
>
> At both the hearing and review board level, the detainee is deprived of substantial due process guarantees. There is no right to jury trial. The right to be appraised of the grounds on which detention was instituted or of the full particulars of the evidence, the right to confront one's accusers, and the right to cross-examine witnesses, are all severely limited if, in the Attorney General's—not a court's—opinion, to divulge information would be dangerous to national security.

Id. at 31,550-51.

The Senate was in full agreement on the need for repeal of the EDA. Senator Inouye, the primary sponsor of S. 592 (the Senate's companion bill to H.R. 234), highlighted the fallout from the House Un-American Activities Report, for example, and stressed that the EDA's preventive detention scheme was "at odds with normal judicial procedure." 117 CONG. REC. 32,144 (1971). He warned that the EDA transformed "the presumption of innocence [into] a presumption of guilt for the accused" and urged his fellow Senators to repeal this "definite threat to every American's freedoms and constitutional rights." *Id.* at 32,144-45.

B. Mr. Padilla Has Been Afforded Far Fewer Due Process Protections Than The EDA Would Have Provided.

Even the EDA would have granted Mr. Padilla more due process protections than the Executive is now willing to provide. Under the EDA, a detainee was to be brought before a preliminary hearing officer within 48 hours of his detention or as "soon thereafter as provision for it be made." 50 U.S.C. § 814(d) (1970). At this preliminary hearing, the detainee was to be advised of his right to counsel and informed of the grounds for the detention. *Id.* § 814(d)(1) and (2). Although the Attorney General could withhold evidence on national security grounds, the detainee was permitted to present evidence on his own behalf and to cross-examine the witnesses who appeared against him. *Id.* § 814(d)(5). The EDA also directed that a written record of the proceeding be kept. *Id.*

If the hearing officer upheld the detention, a detainee had the right to appeal that decision, first to a Detention Review Board and then to the federal courts. *Id.* §§ 815-21. The Detention Board was to have consisted of nine members, appointed by the President with the advice and consent of the Senate. *Id.* § 815. The detainee was entitled to "a full hearing before the Board with all the rights normally accorded in courts of law, including the full opportunity to be represented by counsel, the right at hearings of the Board to testify, to have compulsory process for obtaining witnesses in his favor, and to cross-examine adverse witnesses." H.R. REP. NO. 91-1599, at 5. The detainee was also entitled to learn the particulars of the evidence against him, except to the extent that the Attorney General determined that providing this information would harm national security. *Id.* If the Board denied relief, further appeal was allowed to

the appropriate federal appeals court and eventually to the U.S. Supreme Court. 50 U.S.C. § 821. The EDA also specified that "nothing contained in this Title shall be construed to suspend or authorize the suspension of the privilege of the writ of habeas corpus." *Id.* § 826.

Mr. Padilla has not been afforded due process protections in any way comparable to those provided by the EDA—the same EDA that Congress deemed inadequate. Mr. Padilla has not been allowed to attend any hearing, confront any witness or present evidence on his own behalf. Until recently, he was barred from all communication with his court-appointed attorneys. According to the Executive, he is now permitted access to counsel only as a matter of Executive discretion.[14]

C. Even The Internal Security Committee Bill That Was Rejected As Inadequate In 1971 Would Have Provided Further Protections For Mr. Padilla.

H.R. 820, the rival Internal Security Committee bill which sought to amend (rather than repeal) the EDA, would have at least incorporated more protections into the statute. The bill would have granted detainees financial support in securing the assistance of counsel, as well as assistance in obtaining investigative, expert, or other services necessary for their defense. H.R. REP. NO. 91-1599, at 2. The bill also would have narrowed the grounds under which the EDA could have been invoked. *Id.* The EDA, as adopted in 1950, authorized the preventive detention of citizens in the event of: (1) an invasion; (2) a declaration of war by Congress; or (3) an insurrection within the United States in aid of a foreign enemy. *See* 50 U.S.C. § 812. H.R. 820 would have sig-

[14] United States Department of Defense, "News Release: Padilla Allowed Access to Lawyer," Feb. 11, 2004.

nificantly limited this third category by requiring that any determination of an insurrection be made by concurrent resolution of Congress. H.R. REP. NO. 91-1599, at 2.

But Congress rejected H.R. 820 as inadequate. Members of Congress decided that the bill did not (and could not) go far enough.[15] Congressman Emanuel Celler, Chair of the House Judiciary Committee and a co-sponsor of H.R. 234, expressed this directly to Congressman Ichord:

> The distinguished gentleman from Missouri (Mr. Ichord) . . . seeks to make the retention substitute more palatable by sugar coating it with some procedural changes. However, there is an old saying that you cannot make a purse of silk out of a sow's ear. You might be able to put a dog's tail in a mold, but you cannot make the dog's tail straight. Try as hard and as sincerely as the gentleman from Missouri will—and he is sincere—he cannot remove the evil out of the substitute. He can change the label, but he cannot change the contents of the bottle.

117 CONG. REC. 31,553 (1971).

In line with these sentiments, Congress rejected H.R. 820 in favor of the broad prohibition against preventive detention now codified at § 4001(a). Despite this, Mr. Padilla has been held in preventive detention for twenty-two months under conditions that fall far short of the due process protections provided for in the EDA itself.

[15] Congressman Robert F. Drinan, a co-sponsor of H.R. 234, argued that H.R. 820, like the EDA, was "defective in procedural safeguards" and emphasized that the amendments proposed "would leave untouched the heart of the law." 117 CONG. REC. 31,778-79 (1971).

CONCLUSION

For all the foregoing reasons, *Amici* respectfully request that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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April 12, 2004

No. 03-1027

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN,
as next of friend of Jose Padilla,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF JANET RENO, *ET AL.*, AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are lawyers with many years of government service in law enforcement and intelligence. They submit this brief to help the Court understand the legal and practical framework within which the government has historically tracked, identified, and punished terrorists, and prevented terrorist attacks.[1]

SUMMARY OF ARGUMENT

The government asserts that the President has inherent power to imprison an American citizen indefinitely and without access to counsel or courts, based upon his essentially unreviewable determination that the citizen is an enemy combatant, even when the citizen is arrested within the United States and not on an active field of battle. The government claims that this power is essential to perform the Commander-in-Chief's function of protecting the Nation from attack, and that, as Judge Wesley put it in his dissenting opinion in the Court of Appeals, "[t]he President would [otherwise] be without any authority to detain a terrorist citizen dangerously close to a violent or destructive act on U.S. soil unless Congress declared the area in question a zone of combat *or* authorized the detention." *Padilla v. Rumsfeld*, 352 F.3d 695, 728 (2d Cir. 2003) (Wesley, J., dissenting in part). Amici submit that this fear is unfounded.

The government argues that two interests justify the assertion of presidential authority: preventing acts of terror

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[1] A list of the amici who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici curiae or counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of this Court's rules, the parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of the Court.

by enemy combatants and gathering intelligence about terrorist threats. Pet. Br. at 28-30. These are critical national interests. But suggesting that the sweeping power the President asserts here is necessary to accomplish them undervalues the arsenal of tools already at the government's disposal to fight terrorism. Our laws provide robust investigative techniques and ample detention and prosecution authority against citizen and non-citizen terrorists alike. In the last few years alone, the government has arrested and convicted numerous potential terrorists and many who have provided them aid. According to the Director of the Federal Bureau of Investigation, the government and its allies have thwarted over a hundred terrorist attacks.[2] To the extent that prosecutions have not been possible, or terrorist attacks such as the tragedy of September 11 have occurred, there is no indication that the sweeping power claimed here by the Executive would have made any difference.

Indeed, this very case demonstrates that the authority asserted by the government is unnecessary. Respondent Jose Padilla was immediately detained as a material witness upon entry into the United States. And in declaring Padilla an enemy combatant, the President relied upon facts that would have supported charging Padilla with a variety of offenses. The government thus had the authority to arrest, detain, interrogate, and prosecute Padilla apart from the extraordinary authority it claims here. The difference between invocation of the criminal process and the power claimed by the President here, however, is one of accountability. The criminal justice system requires that defendants and witnesses be afforded access to counsel, imposes judicial supervision over government action, and

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[2] *The War Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 18 (2003) [hereinafter *War Against Terrorism Hearing*] (statement of FBI Director Robert S. Mueller).

places congressionally imposed limits on incarceration. The government in this proceeding claims the authority to imprison citizens without counsel, with at most extremely limited access to the courts, for an indefinite term.

Amici do not address the President's power to detain persons, including citizens, seized on an active field of combat. The exigencies of military action on the battlefield present an entirely different set of circumstances than the arrest of a citizen arriving at O'Hare International Airport. In this brief, however, we describe the ample authorities that exist – apart from the untrammeled power to detain citizens the President claims here – to investigate, apprehend, detain, and prosecute persons who may be planning terrorist acts against the United States.

ARGUMENT

I. THE GOVERNMENT HAS A VAST ARRAY OF TOOLS TO PROTECT THE UNITED STATES FROM TERRORIST ATTACK.

In the absence of specific congressional authorization, the danger that citizens of this country will commit acts of violence or conspire to do so has historically been dealt with as a law enforcement matter. Collectively, it is the experience of the amici curiae that the tools available now provide the Executive Branch with broad authority and flexibility to respond effectively to terrorist threats within our borders. Of course, no amount of government authority and resources can prevent every terrorist attack, any more than the government can prevent every robbery, murder, or fraud. But insofar as it can be said that terrorist atrocities, including the September 11 attacks themselves, resulted from any government "failures," they were not attributable to a lack of authority to detain American citizens indefinitely and incommunicado.

A. Existing Tools To Gather Intelligence About Terrorism

The primary tool for preventing terrorist attacks is the gathering of intelligence. Existing law provides the Executive Branch with a wide range of powers to uncover and monitor potential terrorist activities domestically, including physical surveillance, electronic surveillance, physical searches, subpoenas and other means of obtaining records.[3] Individuals may be detained and questioned pursuant to a variety of authorities – the criminal laws, the Immigration and Nationality Act, and the material witness statute, among others. And Congress, recognizing that investigations often require quick action, has provided emergency provisions to ensure that the Executive is not unduly hindered in its ability to respond quickly to emerging terrorist threats. Indeed, these tools for gathering intelligence are so productive that using them to conduct covert surveillance of potential terrorists may be a more effective long-run strategy than arrests and detention.[4]

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[3] The government can also conduct electronic surveillance and physical searches overseas, and can work cooperatively with foreign law enforcement and intelligence agencies. There are generally no constitutional restrictions on the use of investigative techniques against non-United States persons overseas. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990); *see United States v. Bin Laden*, 126 F. Supp. 2d 264, 276 (S.D.N.Y. 2000). Electronic surveillance and physical searches can be conducted against U.S. persons abroad to obtain foreign intelligence information, under certain restrictions imposed by the Executive Branch. Executive Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

[4] *See* Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism: Detention of Suspects Not Effective, They Say*, Wash. Post, Nov. 28, 2001, at A1.

1. *Physical Surveillance*

There are few constitutional restrictions on the government's ability to gather intelligence through physical surveillance (*i.e.*, the observation of people and activities). *See, e.g., Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978) ("When used in good faith, investigative techniques such as physical surveillance . . . violate no constitutional rights of the suspects involved."), *cert. denied*, 440 U.S. 949 (1979). A warrant is generally required only when the surveillance involves physical or technological intrusion into the target's home or other private area. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (surveillance of home with technology that is not in general public use requires warrant); *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984) (video surveillance inside target's business requires warrant), *cert. denied*, 470 U.S. 1087 (1985).

Accordingly, federal agents are permitted freely to conduct "[p]hysical or photographic surveillance of any person." U.S. Dep't of Justice, Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § II(B)(6)(g), at 10 (May 30, 2002), http://www.usdoj.gov/olp/generalcrimes2.pdf. Also, "[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally." *Id.* § VI(A)(2), at 22. These Guidelines were recently amended to expand the FBI's authority to conduct investigations, eliminating "unnecessary procedural red tape" that could interfere with the prevention of terrorist activities. Attorney General John Ashcroft, Remarks on Attorney General

Guidelines (May 30, 2002), http://www.usdoj.gov/ag/speeches/2002/53002agpreparedremarks.htm.[5]

2. *Electronic Surveillance*

Within the United States, the government can intercept communications of potential terrorists pursuant to either Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, or the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq*. These authorities were significantly expanded by the passage of the USA PATRIOT Act.[6] Under Title III, a federal court can issue an order authorizing surveillance upon a showing of probable cause to believe that an individual – not necessarily the target of the surveillance – has committed, or is about to commit, one of a large number of enumerated offenses, and that communications relating to that offense will be intercepted. 18 U.S.C. § 2518(3)(a), (b).[7] The potential predicates for electronic surveillance under Title III

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5 The Justice Department also recently revised its guidelines governing the conduct of national security investigations, including terrorism investigations. These guidelines are classified and are available publicly only in heavily redacted form. U.S. Dep't of Justice, Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collections (Oct. 31, 2003), http://www.usdoj.gov/olp/nsiguidelines.pdf.

6 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

7 Title III also requires a showing that normal investigative procedures have been or are likely to be unsuccessful. 18 U.S.C. § 2518(1)(c). In practice, this showing has not proved difficult for the government. *See, e.g., United States v. Santana*, 342 F.3d 60, 65 (1st Cir. 2003) (government must show reasonable good faith effort to use normal investigatory methods but not that it exhausted all procedures), *cert. denied*, -- U.S. -- , 124 S. Ct. 1478 (2004); *United States v. McGuire*, 307 F.3d 1192, 1197-98 (9th Cir. 2002) (government has more latitude to wiretap when threat is grave).

include most terrorism-related offenses. *See id.* § 2516(1). Title III permits the interception of wire communications (such as telephone or cell phone calls), oral communications, and electronic communications (including e-mails, faxes, and pager transmissions). *Id.* § 2510(1), (2), (12). Orders can be issued for renewable 30-day periods. *Id.* § 2518(5).

Even when there is insufficient evidence to commence a criminal investigation, FISA provides the government with tools to investigate "international terrorism." 50 U.S.C. §§ 1801 *et seq.*[8] Electronic surveillance under FISA requires the government to obtain an order from a judge of the Foreign Intelligence Surveillance Court,[9] based upon a showing of probable cause to believe that the target of the surveillance is "a foreign power or agent of a foreign power" and is using the facilities or places where the surveillance will occur. *Id.* § 1805(a)(3)(A), (B). The definition of a foreign power includes "a group engaged in international terrorism or activities in preparation therefor." *Id.* § 1801(a)(4). An agent of a foreign power can include a U.S. citizen who "knowingly engages in . . . international terrorism, or activities that are in preparation therefor." *Id.* § 1801(b)(2)(C). FISA surveillance can be authorized for up to 90 days, 120 days, or one year, depending on the target, and can be renewed by the court. *Id.* § 1805(e). In 2002, the government obtained over 1,000 FISA orders targeting

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[8] "International terrorism" includes "violent [criminal] acts or acts dangerous to human life" intended to influence a nation or "intimidate or coerce" its population, either outside the United States or "transcend[ing] national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." 50 U.S.C. § 1801(c).

[9] The Foreign Intelligence Surveillance Court was created under FISA to consider applications for electronic surveillance in foreign intelligence investigations. 50 U.S.C. § 1803(a).

"terrorists, spies, and foreign powers who threaten our security." *War Against Terrorism Hearing*, *supra*, at 10 (statement of Attorney General John Ashcroft).[10]

To obtain a FISA warrant, the government must certify that "a significant purpose" of the surveillance is the collection of foreign intelligence information. 50 U.S.C. § 1804(a)(7)(B). This language, enacted as part of the USA PATRIOT Act, greatly enhanced the government's ability to use FISA to counter terrorist threats. Previously, some courts had permitted FISA surveillance only when intelligence collection was the government's "primary purpose." *See, e.g.*, *United States v. Megahey*, 553 F. Supp. 1180, 1189-90 (E.D.N.Y. 1983), *aff'd sub nom. United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). To ensure that this requirement was honored, and that FISA was not used in criminal investigations to bypass the stricter requirements of Title III, the Department of Justice established limits on the dissemination of FISA surveillance information to criminal investigators. *See In re Sealed Case*, 310 F.3d 717, 727-28 (For. Intel. Surv. Ct. Rev. 2002). The USA PATRIOT Act largely eliminated these limits, permitting a relatively free flow of information between intelligence and criminal investigators. *Id.* at 734-35.[11]

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[10] The government's annual FISA reports show that since its inception the Foreign Intelligence Surveillance Court has approved over 15,000 applications without modification, approved six applications with modifications, and declined to approve one application while granting leave to amend. *See* http://fas.org/irp/agency/doj/fisa/index.html.

[11] Similarly, the USA PATRIOT Act relaxed the requirements of grand jury secrecy and the confidentiality of intercepted communications, to permit criminal investigators to share relevant information with intelligence agents. USA PATRIOT Act § 203(a), 115 Stat. at 278-80 (permitting disclosure of grand jury materials when matters involve foreign intelligence or counterintelligence), *codified at* Fed. R. Crim. P. 6(e)(3)(D); USA PATRIOT Act § 203(b)(1), 115 Stat. at 280 (allowing

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Importantly, both Title III and FISA allow the government to conduct emergency surveillance without a court order if the need is so pressing that there is no time to obtain court approval. 50 U.S.C. § 1805(f) (allowing FISA surveillance for 72 hours before seeking court order); 18 U.S.C. § 2518(7) (allowing Title III surveillance for 48 hours before seeking a court order). According to FBI Director Robert S. Mueller, the government has made extensive use of these emergency provisions against terrorists.[12]

In addition to intercepting the contents of wire, oral, and electronic communications, the government can obtain a court order permitting the use of pen registers and trap and trace devices, merely by stating that the information is relevant to a criminal investigation or to protect against international terrorism. 18 U.S.C. § 3123(a); 50 U.S.C. § 1842(a), (c)(2). These devices allow investigators to record the receipt and transmission of electronic data such as dialed or received telephone numbers or e-mail and Internet usage. 18 U.S.C. § 3127(3)-(4). At a congressional hearing in 2002, a Department of Justice representative stated that the pen register and trap and trace authority "[a]bsolutely" had provided a successful tool in the fight against terrorism. *Tools Against Terror: Hearing Before the Tech., Terrorism & Gov't Info. Subcomm. of the Senate Comm. on the Judiciary*, 2002 WL 31272589, 107th Cong. (2002) (unpaginated) (statement of Deputy Assistant Attorney General Alice Fisher).

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government officials to disclose contents of intercepted communications if contents include foreign intelligence or counterintelligence), *codified at* 18 U.S.C. § 2517(6).

[12] *War Against Terrorism Hearing*, *supra*, at 16 (statement of FBI Director Mueller).

3. *Physical Searches*

The government's authority to obtain warrants to search for and seize evidence of a crime, based on probable cause, is well established. U.S. Const. amend. IV; *Illinois v. Gates*, 462 U.S. 213, 243-46 (1983); Fed. R. Crim. P. 41. Probable cause is a "practical, nontechnical conception that deals with the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, -- U.S. -- , 124 S. Ct. 795, 799 (2003) (internal quotations omitted). It is not "comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Moreover, the government need not show probable cause to conduct searches at the border. *See United States v. Flores-Montano*, -- U.S. -- , 124 S. Ct. 1582, 1585-86 (2004).

In the case of international terrorism, the government can also obtain search warrants under FISA. FISA search warrants do not require a showing of probable cause to believe that a crime has been or will be committed. Rather, the government need only establish probable cause to believe that the target of the search is a foreign power or an agent of a foreign power and that the premises or property to be searched is owned, possessed, or used by a foreign power or an agent of a foreign power, and certify that a significant purpose of the search is to obtain foreign intelligence information. 50 U.S.C. §§ 1823(a)(7)(B), 1824(a)(3). FISA physical search warrants can authorize multiple searches over a period of time. *Id.* § 1824(c)(1)(D). FISA also contains emergency provisions, one of which allows the government to search the residence of a suspected terrorist for up to 72 hours before seeking court authorization if notice is provided immediately to the court. *Id.* § 1824(e)(1).

To protect national security and avoid alerting the targets, the government can execute a FISA search warrant in secret. *See* 50 U.S.C. § 1824(a) (authorizing *ex parte* order approving FISA physical search); *id.* § 1822(4)(A)(i) (court may order landlord or custodian to furnish assistance "necessary to accomplish the physical search in such a manner as will protect its secrecy"). Indeed, even in the case of traditional criminal searches, the USA PATRIOT Act permits a court to delay notifying a target of the search to protect an investigation. USA PATRIOT Act § 213, 115 Stat. at 286, *codified at* 18 U.S.C. § 3103a(b).

4. *Obtaining Records*

In addition to these extensive investigative powers, the government has far-reaching powers to obtain records and evidence. It may use the grand jury process to issue subpoenas and ferret out information about possible terrorist threats. There is no probable cause requirement for a grand jury subpoena; as this Court has recognized, the facts that might lead to a finding of probable cause, such as the "'identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.'" *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991). (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)). Thus, the scope of relevancy to a grand jury's inquiry is extraordinarily broad. *Id.* at 301 (records subpoenaed by a grand jury must be produced unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

Similar broad power exists in investigations of international terrorism. FISA permits the FBI to obtain from the Foreign Intelligence Surveillance Court an order for the production of "any tangible things (including books, records,

papers, documents, and other items)" by certifying that the records are sought as part of an investigation to protect against international terrorism. 50 U.S.C. § 1861(a)(1), (b)(2).[13] The order must be entered *ex parte* and without disclosing the purpose of the investigation. *Id.* § 1861(c). Disclosure of the order, even by the recipient, is prohibited. *Id.* § 1861(d).

Indeed, in terrorism investigations the government can obtain certain types of records even without a court order by the use of so-called "national security letters." For example, 12 U.S.C. § 3414 grants the FBI the right to obtain financial records by certifying that they are sought for "foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities." *Id.* § 3414(a)(1)(A)-(C), (a)(5)(A).[14] As under FISA, a government request under this provision may not be disclosed. *Id.* § 3414(a)(3), (a)(5)(D). National security letters can also be used to obtain credit records and transactional records of wire and electronic communications. 15 U.S.C. § 1681u; 18 U.S.C. § 2709(a).

5. *Interrogation*

The government has the ability to obtain information by questioning persons who may be associated with, or have information about, terrorists. There is, of course, no

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[13] Section 215 of the USA PATRIOT Act expanded this power. 115 Stat. at 287. Previously, the FBI could only seek business records from a limited class of entities and the target had to be a "foreign power or an agent of a foreign power." 50 U.S.C. § 1862(a), (b)(2)(B) (2000).

[14] Recent legislation greatly broadened the range of "financial institutions" from which records may be obtained by national security letter to include currency exchanges, travel agencies, pawnbrokers, casinos, and the U.S. Postal Service. *See* Intelligence Authorization Act for Fiscal Year 2004 § 374(a), Pub. L. 108-177, 117 Stat. 2599, 2628 (2003), *codified at* 12 U.S.C. § 3414(d).

restriction on the government's ability to question persons in a non-coercive setting; agents are free to ask any question of any person, who is free to decline to answer or simply to walk away. *See, e.g.*, *Florida v. Royer*, 460 U.S. 491, 497-98 (1983). If the agent has a reasonable suspicion of criminal activity, he or she may briefly detain the person for questioning. *Terry v. Ohio*, 392 U.S. 1 (1968). Persons who have been taken into custody can be questioned after they have been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and, if they request counsel, in the presence of counsel.

The government has argued that these requirements will impair its ability to obtain information from enemy combatants, and that it requires indefinite, uncounselled detention for effective interrogation of terrorists. *See Padilla v. Rumsfeld*, 243 F. Supp. 2d 42, 49-53 (S.D.N.Y. 2003). It may be true that in some cases the government will not be able to obtain information from citizens who are informed of their right to counsel, or that obtaining that information may be delayed – although as the District Court noted in this case, that conclusion itself is speculative. *Id.* at 51-53.[15] In fact, many terrorists who have been arrested and provided counsel have decided to cooperate and provide valuable information to the government. *See infra* pp. 22-24. Others might not cooperate even if detained indefinitely and without counsel. But more importantly, as a Nation we have chosen to place some limits on Executive authority in order to protect individual authority.

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[15] In a study of interrogation of criminal suspects, over three-quarters of the suspects waived their *Miranda* rights, and almost two-thirds provided incriminating information after being warned. Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 tbl. 3, 280-81 tbl. 7 (1996).

B. Existing Tools to Apprehend Terrorists

When investigative tools produce information that an individual is involved with terrorism, the government has a variety of authorities under which it can arrest, detain, and question that person. Most obviously, a person can be arrested if there is probable cause to believe that he or she has committed a crime, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *United States v. Watson*, 423 U.S. 411, 415-23 (1976), and can be held in custody after arrest.[16] Many federal statutes can be used to arrest and prosecute persons who actually commit terrorist acts.[17]

Of course, preventing a terrorist act from occurring is far more desirable than apprehending and punishing someone who has already completed an attack. In recent years, Congress has passed a number of statutes expanding and supplementing the government's authority to prosecute terrorists before they strike. These include a prohibition on

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[16] An arrested individual must be taken before a court "without undue delay," Fed. R. Crim. P. 5(a), and can be detained if no bail conditions would "reasonably assure . . . the safety of any other person and the community," 18 U.S.C. § 3142(e). Suspects believed to be involved with terrorism are likely to be detained as flight risks or dangers to the community even if they are not charged with terrorism offenses.

[17] *See, e.g.*, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); *id.* § 844 (manufacture and handling of explosive materials); *id.* § 924(c)(1)(A)(iii) (possession of firearms in furtherance of crimes of violence); *id.* § 1111 (murder committed while conducting espionage or sabotage); *id.* § 1113 (attempt to commit murder or manslaughter within special maritime or territorial jurisdiction); *id.* § 1114 (murder of federal officer or employee); *id.* § 1117 (conspiracy to murder a U.S. person, U.S. officer, or foreign official); *id.* § 2332 (attempted homicide of U.S. national outside the U.S.); *id.* § 2332a(a)(1) (use of certain weapons of mass destruction); *id.* § 2332b (acts of terrorism transcending national boundaries); *id.* § 2381 (treason); *id.* § 2384 (seditious conspiracy); 49 U.S.C. § 46502 (aircraft piracy); *id.* § 46504 (interference with flight crew members and attendants).

providing "material support or resources," or concealing material support or resources, knowing or intending that they are for use in preparing for or carrying out a terrorist offense, 18 U.S.C. § 2339A; a prohibition on providing "material support or resources" to any terrorist organization designated by the Secretary of State, *id.* § 2339B;[18] and a prohibition on providing or collecting funds intending that they will be used to carry out a terrorist act, *id.* § 2339C. These statutes give the government considerable authority to prosecute individuals who are associated with terrorism, long before any terrorist act has been committed. For example, "material support" for terrorism includes not only weapons and personnel, but also training, safehouses, lodging, false documentation, communications equipment, financial services, and currency. *Id.* § 2339A(b).[19]

The government has also relied on the International Emergency Economic Powers Act (IEEPA)[20] to promulgate far-reaching regulations to disrupt the funding of terrorist activity. *See, e.g.*, Continuation of Emergency With Respect

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[18] As of March 2004, the Secretary of State had identified 37 groups as foreign terrorist organizations, including al Qaeda. *See* Press Release, Dep't of State, Redesignation of Foreign Terrorist Organizations (Mar. 22, 2004), http://www.state.gov/r/pa/prs/ps/2004/30649.htm.

[19] The Court of Appeals for the Ninth Circuit has held that section 2339B's prohibition of material support in the form of "personnel" and "training" is unconstitutionally vague and it required that the defendant have knowledge that the organization was a terrorist group. *Humanitarian Law Project v. Dep't of Justice*, 352 F.3d 382, 393-94, 403-04 (9th Cir. 2003). *But see United States v. Al-Arian*, No. 8:03-CR-77-T-30TBM, 2004 WL 516571, at *9-10 (M.D. Fla. Mar. 12, 2004) (finding it unnecessary to hold Section 2339B unconstitutionally vague and instead implying *mens rea* requirement).

[20] 50 U.S.C. § 1701(a) (providing the President with broad authority "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States if the President declares a national emergency with respect to such threat").

to the Taliban, 66 Fed. Reg. 35,363 (Jun. 30, 2001). Under IEEPA regulations, "no U.S. person may deal in property or interests in property of a specially designated terrorist, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist." 31 C.F.R. § 595.204 (2003).[21] Violations of the IEEPA regulations are felonies. 50 U.S.C. § 1705(b). The government can also freeze accounts or seize property belonging to terrorist organizations when these items come within the United States or within the possession of a United States citizen. 31 C.F.R. § 595.201.

U.S. citizens associating themselves with terrorist groups will often be subject to prosecution under other statutes as well. The seditious conspiracy statute prohibits plotting to overthrow the United States, to levy war against the Nation, or unlawfully to seize or possess any government property. 18 U.S.C. § 2384. Another statute forbids enlisting within the United States "with intent to serve in armed hostility against the United States." *Id.* § 2390. The Neutrality Act of 1794 prohibits various acts of war against entities with whom the United States is at peace. *Id.* §§ 958-962. The reach of these statutes is not limited to traditional conflicts between nations, but extends to terrorist activities.[22]

Finally, statutes of more general applicability can also be used to reach inchoate terrorist activity. *See, e.g.*, 18 U.S.C. § 371 (conspiracy to violate federal law); *id.* § 2332a(a)(1) (attempted use of a weapon of mass

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[21] *See United States v. Lindh*, 212 F. Supp. 2d 541, 560-64 (E.D. Va. 2002) (upholding IEEPA regulations in prosecution of American who fought alongside the Taliban in Afghanistan).

[22] *See, e.g. United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (seditious conspiracy); *United States v. Khan*, No. CRIM.03-296-A, 2004 WL 406338, at *23 (E.D. Va. Mar. 4, 2004) (Neutrality Act, 18 U.S.C. § 2390).

destruction).[23] A conspiracy charge does not require that a defendant actually carry out the goals of the conspiracy. Rather, the government must prove only an agreement to achieve an unlawful objective, a defendant's knowing and voluntary participation in that agreement, and the commission of an overt act (not necessarily by the defendant) that furthers the conspiracy. *United States v. Bayer*, 331 U.S. 532, 542 (1947). Similarly, establishing that a defendant attempted a crime requires only proof that he or she has "taken a substantial step towards that crime" and "had the requisite mens rea." *Braxton v. United States,* 500 U.S. 344, 348 (1991). In short, the government need not await the actual commission of a terrorist act to arrest, prosecute, and convict a would-be terrorist.

Even when there is insufficient evidence to charge a citizen with a crime, the material witness statute, 18 U.S.C. § 3144, permits the detention of a person whose testimony is "material in a criminal proceeding" if "it may become impracticable to secure the presence of the person by subpoena." This statute is an effective counter-terrorism tool for several reasons. Because a grand jury investigation is a "criminal proceeding" for purposes of this statute, *see United States v. Awadallah*, 349 F.3d 42, 49-64 (2d Cir. 2003); *Bacon v. United States*, 449 F.2d 933, 939-41 (9th Cir. 1971), and because of the broad scope of grand jury investigations, *see supra* p. 11, the government can detain a suspected

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[23] Numerous specific conspiracy provisions could also apply to terrorist activity. *See, e.g.*, 18 U.S.C. § 37 (conspiracy to commit violence at international airport); *id.* § 175(a) (to collect or use biological weapons); *id.* § 229(a)(2) (to collect or use chemical weapons); *id.* § 372 (to injure any officer of the United States); *id.* § 1203(a) (to take hostages); *id.* § 2332a (to use a weapon of mass destruction); *id.* § 2332b(a)(2) (to terrorize across international boundaries), *id.* § 2384 (seditious conspiracy).

terrorist as a material witness before it has evidence sufficient to support a criminal arrest or indictment.[24]

The government can obtain a material witness warrant with relative ease. For a grand jury witness, the required showing can be made by a good faith statement by a prosecutor or investigating agent that the witness has information material to the grand jury. *Bacon*, 449 F.2d at 943; *Awadallah*, 349 F.3d at 65-66. Nor would establishing that a suspected terrorist poses a flight risk be an onerous task. *See* 349 F.3d at 69 (bail denied in part because witness failed to come forward with material testimony concerning terrorist attack).

Finally, the material witness statute can help prevent terrorist acts by incapacitating terrorists. A material witness may only be detained until his or her testimony has been secured. *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413, 419-20 (5th Cir. 1992). However, if further investigation reveals evidence that the witness was actually part of a terrorist conspiracy or has committed perjury before the grand jury, he or she may be re-arrested as a criminal suspect, without the necessity of release. *See Awadallah*, 349 F.3d at 47, 63, 70; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 303 (S.D.N.Y. 2002) (citing *United States v. Regan*, 103

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[24] Following the September 11 attacks, the government detained a number of individuals as material witnesses to its investigation, half of whom were held for 30 days or more. Letter from Jamie E. Brown, Acting Ass't Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee, at 50 (May 13, 2003), http://www.house.gov/judiciary/patriotlet051303.pdf. *See also Padilla*, 352 F.3d at 699-700; *Awadallah*, 349 F.3d at 47; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

F.3d 1072, 1079 (2d Cir. 1997)).[25] The suspected terrorist will thus remain unable to perpetrate any attacks.[26]

C. Existing Tools to Protect Classified Information

Prosecution of terrorists often requires balancing the defendant's constitutional rights and the government's legitimate interests in protecting national security. Federal law amply recognizes these national security interests and protects them in a variety of contexts. Federal grand jury proceedings, and proceedings ancillary to the grand jury, are secret. Fed. R. Crim. P. 6(e); *see In re Newark Morning Ledger*, 260 F.3d 217, 226 (3d Cir. 2001) ("The secrecy afforded to grand jury materials under Fed. R. Crim. P. 6(e) extends beyond the actual grand jury proceeding to collateral matters, including contempt proceedings, which relate to grand jury proceedings and may potentially reveal grand jury information.") (citations omitted). For example, in the present case the material witness warrant for Padilla's arrest, and the affidavit submitted by the government in support of that warrant, remain sealed. More generally, the government

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[25] For example, Terry Nichols, one of the perpetrators of the Oklahoma City bombing, was initially arrested and detained as a material witness, and was not actually charged with the crime for 18 days. *In re Material Witness Warrant*, 77 F.3d 1277, 1278-79 (10th Cir. 1996).

[26] In the case of non-citizens, the Immigration and Nationality Act provides additional authority to detain potential terrorists. Any alien seeking to enter the country who has engaged in terrorist activity, or who the government has reasonable ground to believe is likely to engage in terrorist activity, is inadmissible for national security reasons. 8 U.S.C. § 1182(a)(3)(B). Similarly, an alien who is lawfully in the country who engages in terrorist activity is deportable. *Id.* § 1227(a)(4)(A)-(B). "Engaging in terrorist activity" is broadly defined to include not only carrying out terrorist acts, but also planning or preparing for such acts, or membership in or material support for a terrorist organization. *Id.* § 1182(a)(3)(B)(iv). Any alien who the Attorney General certifies is deportable or inadmissible for national security reasons must be detained until removed. *Id.* § 1226a.

is permitted to withhold the identity of informants in many circumstances. *See, e.g., Roviaro v. United States*, 353 U.S. 53, 59-61 (1957). And, as happened in this case, courts will frequently permit the government to file papers under seal if disclosure of the information in those papers could harm national security. *See, e.g., United States v. Ressam*, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) (denying press requests to unseal classified documents filed under seal).

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, gives courts additional ability to protect classified materials during criminal prosecutions.[27] CIPA permits the court to authorize the government to delete classified information from any materials disclosed to the defendant, to substitute a summary of such classified documents, or to substitute admissions regarding the relevant facts that the classified information would tend to prove. *Id.* § 4. A defendant must notify the government and the court in writing before disclosing classified information. *Id.* § 5(a).

Before any classified information may be used at trial or pretrial, the government can request a hearing to determine its relevance and admissibility. *Id.* § 6(a). This hearing may be held *ex parte* and *in camera*. *See, e.g., United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998). If the court determines that the evidence is admissible, the government must then find an alternative method of getting the information to the jury that is less harmful to national

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[27] CIPA's constitutionality has been upheld. *See, e.g., United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (rejecting Fifth and Sixth Amendment challenges); *United States v. Lee*, 90 F. Supp. 2d 1324, 1326-29 (D.N.M. 2000) (same); *United States v. Poindexter*, 725 F. Supp. 13, 33-35 (D.D.C. 1989) (same). *But cf. Crawford v. Washington*, -- U.S. -- , 124 S. Ct. 1354 (2004) (holding that Confrontation Clause generally prevents use of testimonial statements by prosecution when defendant lacks opportunity to cross-examine witness).

security, such as providing an unclassified summary of the relevant information or admitting certain facts. 18 U.S.C. App. III, § 6(c); *United States v. Noriega*, 117 F.3d 1206, 1215 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). Ultimately, however, if no adequate substitute can be found, the court has the authority to strike certain counts, preclude certain evidence, make findings against the government, or even dismiss the case, if it is necessary in the interest of justice. 18 U.S.C. App. III, § 6(e)(2). A recent examination of the use of CIPA showed that charges are rarely dismissed.[28]

II. THE SWEEPING POWER THE PRESIDENT CLAIMS IS UNWARRANTED.

These authorities, broad and powerful on paper, have been effective in practice. Over the last decade, the investigative, detention, and prosecutive authorities discussed above have been used in many cases not only to identify, arrest, and punish persons who have committed terrorist acts,[29] but to disrupt and thwart terrorism before it can occur. A year ago Attorney General Ashcroft identified 211 terrorism-related criminal charges that had been brought to that date, with 108 convictions or guilty pleas. *War Against Terrorism Hearing*, *supra*, at 10 (statement of Attorney

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[28] Committee on Communications and Media Law, *The Press and The Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 57 The Record 94, 161 n.263 (2002) (authors found only one case in which a court dismissed charges pursuant to § 6(e)).

[29] *See, e.g., United States v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, -- U.S. -- , 124 S. Ct. 353 (2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to hijack airliners); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), *cert. denied*, 526 U.S. 1028 (1999) (affirming convictions of defendants involved in 1993 World Trade Center bombing); *Kasi v. Virginia*, 508 S.E.2d 57 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999) (affirming conviction of defendant who murdered CIA employees).

General Ashcroft). A listing of some of these cases illustrates the effectiveness of the investigative tools we have described to stop terrorists before they carry out their plans:

- Sheikh Omar Abdel Rahman and his followers were convicted of plotting a "day of terror" against New York City landmarks, including the United Nations building, the Lincoln and Holland Tunnels and the George Washington Bridge. The government used traditional investigatory powers, including physical surveillance, search warrants, and informants, to track the activities of this group, and arrested them when they had begun building an explosive device. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

- Ahmed Ressam, the so-called "Millennium Bomber," was arrested in December 1999 as he attempted to enter the United States in a rental car containing homemade explosives and timers. Ressam eventually pleaded guilty and cooperated extensively with the government in its prosecution of others involved in the planned attacks. He also provided more general information about al Qaeda and its training camps in Afghanistan and identified potential terrorists.[30]

- Iyman Faris pleaded guilty to providing material support for terrorism. Faris visited an al Qaeda training camp in Afghanistan and investigated the destruction of bridges in the United States by severing their suspension cables. The government developed evidence through physical and electronic surveillance

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[30] *See* Michael Powell & Christine Haughney, *Los Angeles Airport Intended Target, Terrorism Plot Defendant Tells Jury*, Wash. Post, July 4, 2001, at A2; *see also* Ann Davis, *Surprising Number of Bin Laden Followers are Helping U.S. Investigators*, Wall St. J., Dec. 21, 2001, at B1.

and a search of his residence. After his arrest Faris cooperated with investigators.[31]

- Several members of a terrorist cell in Portland, Oregon, were indicted on conspiracy, material support, and firearms charges. One of the defendants pleaded guilty and testified against the others, leading to guilty pleas from them. Six of the men had attempted to travel to Afghanistan to assist the Taliban. The government used electronic surveillance and the authorities of the USA PATRIOT Act to develop evidence in the case.[32]

- Six residents of New York State pleaded guilty to charges arising from their travel to Afghanistan and attendance at al Qaeda training camps. The evidence against them was developed from electronic surveillance. They agreed to cooperate with government investigations of terrorist activities.[33]

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[31] *See* Jerry Markon, *Ohio Man Gets 20 Years for Al Qaeda Plot*, Wash. Post, Oct. 29, 2003, at A2; *FBI Questioned Faris After Sept. 11 Attacks*, Houston Chron., June 21, 2003, at 10; Ted Wendling, *Ohio Agents Tailed Terrorist for More Than a Year*, Plain Dealer, June 21, 2003, at A1; *see also* Press Release, Dep't of Justice, Iyman Faris Sentenced for Providing Material Support to Al Qaeda (Oct. 28, 2003), http://www.usdoj.gov/opa/pr/ 2003/October/03_crm_589.htm.

[32] *See* Lynn Marshall & Tomas Tizon, *Three Members of Terrorist Cell Sentenced; One of the 'Portland Seven' Expresses Sorrow for Trying to Join the Taliban After 9/11*, L.A. Times, Feb. 10, 2004, at A12; Blaine Harden & Dan Eggen, *Duo Pleads Guilty to Conspiracy Against U.S.*, Wash. Post, Oct. 17, 2003, at A3; *see also* Press Release, Dep't of Justice, Two Defendants in 'Portland Cell' Case Plead Guilty to Conspiracy to Contribute Services to the Taliban, Federal Weapons Charges (Sept. 18, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_crm_513.htm.

[33] *See* John Kifner & Marc Santora, *Feds Say One in N.Y. Cell Arranged Training*, Pitts. Post-Gazette, Sept. 18, 2002, at A6; Tamer El-Ghobashy & Greg Smith, *E-Mail Led to Cell Bust*, N.Y. Daily News, Sept. 17, 2002, at 8; *see also* Press Release, Dep't of Justice, Mukhtar Al-

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- Earnest James Ujaama pleaded guilty to providing material support to terrorism related to his involvement in a 1999 plan to build a terrorist training camp in Oregon. After pleading guilty, Ujaama cooperated with the government, serving as a key witness in a grand jury investigation of an alleged top al Qaeda recruiter.[34]

- Sami Al-Arian, a university professor, and seven others were indicted for conspiring to finance terrorist attacks. The evidence against Al-Arian was derived from extensive FISA wiretaps, which could be used in the criminal case because of the new procedures enacted by the USA PATRIOT Act.[35]

As this discussion demonstrates, there is both a robust legal framework to combat terrorism and a demonstrated history of successful use of those authorities without resort to the extraordinary power claimed here by the President. Contrary to the fears expressed by Judge Wesley in his dissenting opinion, the President has ample "authority to detain a terrorist citizen dangerously close to a violent or destructive act on United States soil." *Padilla*, 352 F.3d at 728 (Wesley, J., dissenting in part). Indeed, there is no indication that any of these cases depended in any way upon such a detention.

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Bakri Pleads Guilty to Providing Material Support to Al Qaeda (May 19, 2003), http://www.usdoj.gov/opa/pr/2003/May/03_crm_307.htm.

[34] *See Witness Said Ready to Testify on Al Qaeda Suspect*, Wash. Post, June 2, 2003, at A2.

[35] *See* Jerry Seper, *Islamic Jihad Suspect Seeks to Represent Himself*, Wash. Times, May 27, 2003, at A1; Michael Fletcher, *Terror Traced to Tampa*, Tampa Trib., Feb. 21, 2003, at 1; Jess Bravin & Glenn R. Simpson, *Confronting Iraq and Terror: Florida Professor, 7 Others Are Accused of Terror Funding*, Wall St. J., Feb. 21, 2003, at A8.

The record in the instant case demonstrates that these authorities were available, and to some extent were actually used, to deal with Padilla himself. Padilla was arrested on May 8, 2002, pursuant to a material witness warrant. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). The court issued the warrant based upon an affidavit from an FBI agent averring that Padilla possessed knowledge of facts relevant to a grand jury investigation of the September 11 attacks. *Id.* at 571. The affidavit was sealed by the District Court and remains under seal. Padilla was transported to New York, where he was detained and counsel was appointed to represent him. *Padilla*, 352 F.3d at 700. The government subsequently asked the court to vacate the material witness warrant and transferred Padilla to the custody of the Department of Defense based upon the President's determination that Padilla was an enemy combatant. *Id.* For almost two years thereafter, until his case came before this Court, Padilla was held incommunicado, without access to his lawyer. *See id.*

When Padilla was arrested pursuant to the material witness warrant, his terrorist plans were thwarted. He was then available to be questioned to the same extent as any other citizen suspected of criminal activity. Moreover, the facts set forth in the President's findings, and the facts presented to the District Court, are more than sufficient to support criminal charges against Padilla, including providing material support to designated terrorist organizations, 18 U.S.C. § 2339B; providing material support to terrorists, *id.* § 2339A; conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a; and attempted use of a weapon of mass destruction, *id.* § 2332a(a)(1).[36] Finally, Padilla's history of

[36] The government claims that Padilla traveled to Afghanistan, approached a senior officer of al Qaeda, proposed stealing radioactive material to build a "dirty bomb" and detonate it in the United States, researched such a project at an al Qaeda safe house in Pakistan, had

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travel outside the United States, previous criminal record, and terrorism-related activities clearly justified detaining him. 18 U.S.C. § 3142(e). In short, the procedures of the criminal law provided an ample basis to detain Padilla, to subject him to interrogation, and to keep him from carrying out any violent acts against the United States or any of its citizens. It is difficult to imagine any circumstances in which a terrorist would meet the standards for designation as an enemy combatant described by the government, *see* Pet. Br. at 27, and not be subject to arrest as a material witness or a criminal.

The difference between what the government did in this case, and what existing law authorizes it to do, is one of accountability and transparency. The government could have continued to detain Padilla, but would have been required to justify the detention to a court in an adversary proceeding, based on the traditional probable cause standard. The government could have questioned Padilla, but would have had to secure the consent of his lawyer to do so. The government could have convicted and imprisoned him, but would have had to do so after a trial in District Court. By denying him these protections, the Executive Branch is claiming a virtually unlimited right to arrest citizens within the United States based solely upon the President's determination that they are enemy combatants, and to imprison them incommunicado for an indefinite period of time without counsel and without meaningful judicial review.

This untrammeled power stands in stark contrast to the legal framework described above. Indeed, none of the

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"extended contacts" with al Qaeda, received training in furtherance of terrorist activities from al Qaeda, and was sent to the United States to conduct reconnaissance or terrorist attacks on behalf of al Qaeda. *Padilla*, 233 F. Supp. 2d at 572-73.

governmental powers described in this brief permits any substantial deprivation of a citizen's liberty or invasion of his or her privacy without congressional authorization and judicial oversight. To pick just one example, electronic surveillance under either Title III or FISA is authorized by statute; requires a court order based on a factual showing under oath; is limited in time and scope; and is subject to subsequent judicial review in court proceedings. *See supra* pp. 6-9. Even in emergency situations, electronic surveillance is permitted without judicial supervision for only a brief period of time. Similarly, the arrest and detention of citizens within the United States pursuant to the criminal law or the material witness statute normally requires a judicial warrant and carries the right of subsequent judicial review with the assistance of counsel; while law enforcement officials may arrest individuals without a warrant, they must timely demonstrate to a court that they had probable cause to do so. *Gerstein v. Pugh,* 420 U.S. 103 (1975); Fed. R. Crim. P. 5; *Awadallah*, 349 F.3d at 59-62 (summarizing numerous procedural safeguards afforded to material witnesses).

The broad and largely unsupervised authority claimed by the Executive Branch is also inconsistent with the fundamental principles of our Constitution. Arbitrary arrest and imprisonment by the King was one of the principal evils that the Constitution and the Bill of Rights were meant to address. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946). These principles have been adhered to even when national security is implicated. For example, this Court rejected the claim that the Executive had inherent authority to detain an alleged Confederate sympathizer outside the field of battle where courts were functioning. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) It questioned the Executive's authority to conduct electronic surveillance in the interest of national security, at least when foreign powers are not involved. *United States v. United States District Court*, 407 U.S. 297 (1972). And it rejected a claim that the Executive

had authority to seize steel mills in wartime. *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952). The power which the Executive seeks in this case is far broader and far more terrifying.[37]

Congress has recognized the danger inherent in Executive power to detain citizens and has provided that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). This statute could not be a clearer congressional rejection of the inherent Executive authority claimed here.[38] The government contends, however, that the Joint Resolution passed by Congress on September 18, 2001, sufficiently authorizes the actions it took here to satisfy section 4001(a). Pet. Br. at 38-44. But that Resolution merely grants broad and generic authority to use military force against the nations, organizations and persons that the President determines were involved in the September 11 attacks. Pet. App. 59a-60a. As the Court of Appeals held, there is "no reason to suspect" that Congress, in granting authority to use military force, "believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not 'arrayed against our troops' in the field of battle." *Padilla*, 352 F.3d at 723 (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003)). A clearer statement of congressional authorization

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[37] For the reasons stated by the Court of Appeals, *Ex parte Quirin*, 317 U.S. 1 (1942), upon which the government principally relies, does not support the detention of Padilla in this case. *Padilla*, 352 F.3d at 715-17.

[38] The government claims that, despite the plain and unqualified language of this statute, it does *not* apply to detention or imprisonment by the military. Pet. Br. 44-49. But the statute refers broadly to detention or imprisonment "by the United States," not by any particular department or agency of the Nation.

should be required before this Court permits the Executive to imprison citizens indefinitely only upon its own say-so.[39]

Amici do not question the power of the President, as Commander-in-Chief, to detain persons, even citizens, seized on an active field of battle. We recognize that the President has broad authority as Commander-in-Chief during a time of war or threat to the security of our Nation. *See, e.g., The Prize Cases,* 67 U.S. (2 Black) 635 (1862). But the exigencies of the battlefield present a vastly different circumstance than even the bustle of O'Hare Airport. There is little or no risk in this case of "fettering . . . a field commander" or "divert[ing] his efforts and attention from the military offensive abroad to the legal defensive at home." *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950). While the government suggests that Padilla was arrested on a "battlefield," Pet. Br. at 37-38, under its standards the "battlefield" against terrorism could extend throughout the world and the "hostilities" could be of indefinite and perhaps undefinable duration. Legal standards developed to deal with traditional wars cannot be imported wholesale into this very different context.

Amici recognize that these limitations might impede the investigation of a terrorist offense in some circumstances. It is conceivable that, in some hypothetical situation, despite the array of powers described above, the government might be unable to detain a dangerous terrorist or to interrogate him or her effectively. But this is an inherent consequence of the limitation of Executive power. No doubt many other steps could be taken that would increase our security, and could

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[39] Congress does not lack the ability to act quickly in response to national emergencies. The Resolution authorizing the use of force was passed one week after the attacks of September 11; the far more complicated USA PATRIOT Act was passed less than seven weeks after those attacks.

enable us to prevent terrorist attacks that might otherwise occur. But our Nation has always been prepared to accept some risk as the price of guaranteeing that the Executive does not have arbitrary power to imprison citizens. *McNabb v. United States*, 318 U.S. 332, 343 (1943). It is amici's belief, moreover, that given the expansive authorities that otherwise exist, the risk to the Nation from denying the Executive the authority it seeks in this case is minimal. If additional Executive authority to detain citizens found within the United States is deemed necessary to protect against terrorism, that authority should come through congressional action, where the boundaries of that power can be defined, the terms of any such detention can be set, and the procedure can be subject to judicial oversight. This Court has never countenanced the untrammeled authority the Executive Branch seeks in this case; it should not do so now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 03-1027

IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* THE RUTHERFORD INSTITUTE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND HUMAN RIGHTS FIRST (FORMERLY THE LAWYERS COMMITTEE FOR HUMAN RIGHTS) IN SUPPORT OF RESPONDENTS

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April 12, 2004

QUESTIONS PRESENTED

1. Whether the district court has jurisdiction over the proper respondent to the amended habeas petition.

2. Whether the President has authority as Commander in Chief and in light of Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), to seize and detain a United States citizen in the United States based on a determination by the President that he is an enemy combatant who is closely associated with al Qaeda and has engaged in hostile and war-like acts, or whether 18 U.S.C. § 4001(a) precludes that exercise of Presidential authority.

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INTEREST OF *AMICI CURIAE*[1]

Amici are three organizations with a range of viewpoints that have joined to address the profoundly important constitutional issues raised by this case.

Since 1978, the Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. Human Rights First supports human rights activists who fight for basic freedoms and peaceful change at the local level; promote fair economic practices by creating safeguards for workers' rights; protect refugees in flight from persecution and repression; work to ensure that domestic legal systems incorporate international human rights protections; and help build a strong international system of justice and accountability for the worst human rights crimes. Human Rights First believes that this case presents compelling issues of justice and the rule of law and is keenly interested in its outcome.

People For the American Way Foundation ("People For") is a non-partisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, including Norman Lear, Father Theodore Hesburgh, and Barbara Jordan, People For now has over 600,000 members and supporters nationwide. One of People For's primary missions is to educate the public on the vital importance of our tradition of liberty and freedom, and to defend that tradition, through litigation and other means, against efforts to

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

limit fundamental rights and freedoms, including the fundamental rights of American citizens at issue in this case.

The Rutherford Institute ("Institute") is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel before this Court and federal appeals courts in many significant civil liberties cases and have filed briefs as *amicus curiae* in numerous criminal procedure cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts. The Institute has also published articles and educational materials in this area. The present case raises important criminal justice and civil liberties concerns, and so is of significance to the Institute.

SUMMARY OF ARGUMENT

Our nation has repeatedly faced perilous threats to its security and even its survival. These threats have come not only from aliens, but from citizens who, through espionage, treason, bombings, and other overt and covert acts of violence, have taken the lives of fellow citizens and threatened to destroy the nation. We therefore have a substantial historical record—from the founding of the nation, the War of 1812 and the Civil War, the Palmer raids of the 1920s, and the internment of Japanese-Americans during the Second World War—that reveals the consistent understanding that the framing generation, this Court, Congress and prior administrations have had of the President's power to detain civilians during national emergencies. The historical record demonstrates that the threat we face today, though undeniably grave, is not unprecedented. What is unprecedented is the executive branch's claim of a unilateral power to detain citizens it deems to be "enemy combatants."

In this case, the executive branch claims that the President can unilaterally determine: (1) when the nation is engaged in armed conflict, (2) what countries or organizations are the enemy, (3) whether particular United States citizens located within the United States are "enemy combatants," (4) whether those citizens should be detained and (5) for how long. According to the executive branch, the President may make these decisions without any guidance from Congress and no one—not even the detained citizen—is permitted to challenge any of his conclusions, in court or anywhere else. The President's decision to detain a United States citizen in this manner is subject to no temporal, procedural or substantive constraints. His decision is final and unreviewable.[2]

The President's assertion of unchecked power to deprive United States citizens of liberty is squarely at odds with the nation's legal history. That history demonstrates conclusively that, even in times of gravest national peril, United States citizens enjoy their liberty secure that the government cannot restrain it except according to duly enacted law. That principle was embedded in the Constitution at the nation's founding, and all three branches of government—including the executive—have enforced or respected it during crises perceived to be every bit as threatening as today's.

In structuring the Constitution, the Framers denied the executive unchecked power over matters of war and military authority. Decisions of this Court from the early days of the Republic to the Civil War and through armed conflicts in the last century have repeatedly and jealously protected the bedrock principle that, even when the survival of the nation itself is at stake, United States citizens may not be detained except according to duly enacted law. And prior administrations essentially have conceded that the President's

[2] The administration details the internal administrative procedures that were used to determine whether a citizen is an "enemy combatant." (Pet. Br. 6-7.) That procedure, however, is not required by law, and apparently could be changed at the whim of the President.

Commander-in-Chief power does not include the power to detain United States citizens without statutory authorization.

In providing such authorization, moreover, Congress must be clear. Because the most fundamental of freedoms are at stake, this Court has refused to read Congressional authorizations to use military force expansively to include the authority to detain United States citizens when civil courts remain open. This Court has consistently required the executive branch to point to legislation that specifically expresses Congress's considered view that the detention of United States citizens is warranted. And Congress has in the past spoken with such clarity. The Authorization for Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), fails this clear statement test.

The executive branch asks this Court to defer to the President on a matter of military judgment and thus permit him to continue to keep Jose Padilla in military custody. But this Court has never slavishly deferred to the executive branch, even during the Civil War, regarding whether the President has unilateral authority to restrain the liberty of citizens. To the contrary, this Court has always drawn and enforced the very line that *amici* propose: when the courts are open and functioning, a citizen in the United States cannot be detained outside the judicial process unless Congress has clearly authorized such an extraordinary act. And, when Congress has authorized such detentions in the past, it has not afforded the President the blanket power he claims here, and instead has provided various procedural rights and safeguards.

In the end, *amici* propose a resolution that is narrow, and properly so. Today is not the day to decide whether the Constitution permits the detention of citizens as "enemy combatants," or to decide what process an accused citizen "enemy combatant" is due under the Constitution. Determining whether the government can act outside the judicial process to detain its own citizens on United States soil when the courts are open and functioning is an issue this Court need

only address if both the executive and legislative branches clearly have agreed that the President must be vested with such power. Because Congress has passed no statute authorizing the detention at issue here,[3] the decision below should be affirmed.

ARGUMENT

I. THE COMMANDER-IN-CHIEF POWER DOES NOT CONFER UNCHECKED AUTHORITY TO DETAIN AMERICAN CITIZENS.

Throughout our nation's history the suggestion that the President's power as Commander in Chief includes unchecked authority, including the authority unilaterally to determine whether a citizen's liberty should be restrained, has been consistently rejected. The Founders purposefully divided the war powers between the President and Congress to ensure that the President would not have unchecked military authority. Prior administrations facing emergencies as grave as those we face today understood and respected the line the administration today proposes to cross: the executive branch may not detain citizens in the United States without Congressional authorization. Finally, this Court has consistently understood that the President's power, even in times of dire conflict, does not include the unchecked power to detain citizens, at least when the courts are available.

1. The Framers. Prior to the American Revolution, an omnipresent force in colonial life was the British Army under the sole control of the King of England. Indeed, among the list of grievances recited in the Declaration of Independence was that the King "has affected to render the Military independent of and superior to Civil power" and "has kept among us, in times of peace, Standing Armies without the Consent of our legislatures." The Declaration of Independence, paras. 13-14. As such, the Framers' fears of unchecked military

[3] *Amici* do not address whether such a statute would be constitutional.

power "are derived in a great measure from the principles and examples of our English ancestors." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1182 (1833). Having experienced first-hand the dangers of such an unchecked executive power, the Framers denied it to the executive they were creating. See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 46 (Adrienne Koch ed., 1987) (the "Prerogatives of the British Monarch [were not] a proper guide in defining the Executive powers") (James Wilson).

To achieve this end, the Framers divided national military power between the executive and legislative branches. While the President was named Commander in Chief of the army and navy, Congress was also granted substantial powers over the military. In particular, Congress, among other things, was authorized to "declare War," "make Rules for the Government and Regulation of the land and naval Forces," "raise and support Armies," and "define and punish ... Offences against the Law of Nations." U.S. Const. art. I, § 8.

These provisions reflect an intent to create a substantial and independent role for Congress in military affairs. During the Constitutional Convention, it was repeatedly recognized that the new Constitution would substantially limit the potential for tyranny inherent in an armed nation. See Madison, *supra*, at 475-77, 481-83 (John Langdon, for example, responded to Elbridge Gerry's complaint that the Constitution would lead to military government by pointing out that the military would be controlled by the "Representatives of the people."). The Framers were conscious that liberty would be threatened were the President, as Commander in Chief, left with unchecked authority to employ the military power of the new nation, especially domestically. See 3 Story, *supra* § 1177 (reciting objections raised to the unlimited power of the new government to "keep large armies constantly on foot" as being "most dangerous, and in its principles despotic"). Ensuring that Congress, the branch of government most

responsive to the people, had a substantial role in controlling the use of the nation's war and military powers was understood as a vital structural protection against threats to liberty. *Id.* § 1182 (explaining that the Constitution eliminated the "danger of an undue exercise of the [military] power" by ensuring that "[i]t can never be exerted, but by the representatives of the people").

The President's assertion of unchecked authority as Commander in Chief to determine when the nation is at war, with whom, which of the nation's citizens are "enemy combatants," and which of those combatants should be detained by the military is flatly at odds with the Framers' clear intent to *limit* the President's military power, especially on United States soil. Having taken such care to subject the President's military powers to Congressional control, the Framers did not intend the phrase "Commander in Chief" to provide the President with unchecked power to use the military to detain citizens in the United States when civilian authorities remain available to enforce the rule of law.

Indeed, the founding generation's distrust of standing armies and its narrow conception of the President's Commander-in-Chief power is reflected in its response to the "undeclared war" with France, the first major threat to the nation's security. France, then a world superpower, had large "numbers of enemy agents operating in th[is] country" and had for years enjoyed the ardent support of many United States citizens. David McCullough, *John Adams* 505 (2001). Operating in a climate of "rampant fear of the enemy within," *id.*, and amidst rumors that French agents were plotting to burn down Philadelphia (the nation's capital and largest city), *id.* at 501, Congress enacted a series of war measures. Notably, however, while the Alien Act gave the President broad authority to expel foreigners he deemed dangerous, the infamous Sedition Act authorized only criminal prosecutions against citizens who conspired to take actions against the United States. An Act respecting Alien Enemies, ch. 66, § 1,

1 Stat. 577, 577 (1798); An act for the punishment of certain crimes against the United States, ch. 74, 1 Stat. 596 (1798).

Even the threat of war with Napoleon did not shake the founding generation's distrust of standing armies. President Adams himself "deplored the idea of a standing army," and Congress raised only a "'provisional'" one to repel a possible invasion. McCullough, *supra*, at 499. When the threat of war receded, Adams and Congress competed in seeking credit for promptly disbanding that provisional force. *Id.* at 540.

Thus, the founding generation's attitudes and actions, even at a time of grave peril to a still weak nation, belie any suggestion that they understood the Commander-in-Chief Clause to confer a sweeping unilateral authority on the President to arrest and detain United States citizens.

2. The War of 1812. Two administrations later, the nation found itself at war with Britain, then the world's greatest naval power. It is easy to forget, nearly two centuries and a number of large-scale wars later, what peril the nation faced at the time. British forces invaded the United States, sacked Washington and, in much the same way as today's enemies, destroyed national symbols, burning and gutting the White House and the Capitol. Due to the deep political divisions of the day, moreover, many Federalists in New England obstructed war efforts, and President Madison feared extremists there were plotting to secede, a possibility the British promoted by blockading all but northern ports. Jack N. Rakove, *James Madison and the Creation of the American Republic* 196, 200-01 (2002).

Despite citizen-led obstructions of the war effort, Congress did not authorize military detentions of citizens. And, in several decisions that this Court later deemed notable "not only for the principles they determine, but on account of the distinguished jurists" involved, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 129 (1866), courts deemed several such detentions unlawful. In *Smith* v. *Shaw*, 12 Johns. 257 (N.Y. Sup. Ct.

1815), New York's highest court held that an American citizen believed to be a British spy was falsely imprisoned by a military commander who detained him for two weeks. Because no act of Congress authorized the plaintiff's trial, "the defendant could certainly have no legal right to detain him." *Id.* at 266. To the defendant's assertion that the plaintiff's detention was "essential to the public safety," *id.* at 260, the court responded that "[i]f the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." *Id.* at 266; see also *In re Stacy*, 10 Johns. 328, 333 (N.Y. Sup. Ct. 1813) (holding that detention of citizen by military official was without "any color of authority"); *McConnell* v. *Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815) (upholding false imprisonment verdict against military officer who detained citizen suspected of espionage, but ordering new trial on damages).

3. The Civil War. In the midst of the gravest threat to the survival of the Union our nation has ever faced, this Court flatly rejected the broad interpretation of the Commander-in-Chief power that the executive branch presses in this case.

During the Civil War, Lamdin P. Milligan was a member of "a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government; ... [held] communication with the enemy; conspir[ed] to seize munitions of war stored in the arsenals; [and] to liberate prisoners of war." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 6-7. In October 1864, Milligan was arrested by military personnel, tried by military commission, and sentenced to death. *Id.* He filed a petition for writ of habeas corpus, insisting upon his right to be released because the military lacked authority to detain a citizen arrested in Indiana, which had never been in rebellion. *Id.* at 108.

The arrest of Milligan had taken place after Congress had authorized the President to suspend the writ of habeas corpus in 1863, An Act relating to Habeas Corpus, ch. 81, 12 Stat.

755 (1863) (the "1863 Act"). But Milligan was still able to obtain judicial review, because the military had failed to observe the procedural dictates of the 1863 Act.[4] *Milligan*, 71 U.S. (4 Wall.) at 114-16. As a result, the government was forced to defend the lawfulness of Milligan's detention and trial, without the benefit of the 1863 Act.

The government asserted that military jurisdiction over Milligan was "complete under the 'laws and usages of war.'" *Id.* at 121. Specifically, the government argued that the nature of the Civil War, which placed Indiana (Milligan's state) under threat of invasion by the enemy, furnished the military with the authority to seize citizens who were aiding the enemy. *Id.* at 126. This Court flatly rejected the argument. In doing so, the Court drew a clear line: "Martial rule can never exist where the courts are open." *Id.* at 127; see also *id.* at 121 (rejecting application of laws of war "in states which have upheld the authority of the government, and where the courts are open and their process unobstructed"). This Court did not question the authority of the President or his military commander to impose rules "on states in rebellion to cripple their resources and quell [an] insurrection." *Id.* at 126. But this Court would not cede to the President, and his military officers, the type of unchecked authority over the liberty of citizens that the executive branch asserts here. The framers "knew ... the nation they were founding ... would be involved in war ... and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen." *Id.* at 125.[5]

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[4] The significance of those procedural requirements is discussed in more detail *infra* at 23-28.

[5] *Milligan* affirmed the views of other state and federal courts that the President's power as Commander in Chief does not include the authority to suspend the writ of habeas corpus without Congressional authorization. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, J.) (holding that Congress alone possesses the power to suspend the writ of habeas corpus); *In re Kemp*, 16 Wis. 359, 367-68 (1863)

The executive branch here seeks precisely the authority the Lincoln Administration was denied. It asserts that the nature of the war with al Qaeda requires military authority to detain United States citizens, despite the fact that civil courts remain open. Pet. Br. 35-38. During the Civil War itself, however, the very survival of the nation was at stake, and the organizations to which Milligan belonged had stockpiled weapons, conspired with rebel agents to plot insurrections against the government, and "coordinated an invasion of Missouri with guerrilla attacks." James M. McPherson, *Battle Cry of Freedom: The Civil War Era* 783-84 (1988). Other saboteurs received $5 million from the Confederate government and used it to destroy or damage military installations in Missouri and Illinois and hotels in New York City. *Id.* at 764. Yet, despite these terrorist-like activities in aid of a full-scale military rebellion, the courts refused to acquiesce in the President's assertion of unchecked power over the liberty of citizens.

4. Twentieth Century Responses to National Crises. No doubt influenced by Civil War-era precedents, the executive branch responded to several national emergencies during the twentieth century by seeking statutory authority to detain American citizens. These actions reflect the recognition of prior administrations that they lacked such authority in the absence of Congressional authorization.

A. The Palmer Raids. In April 1919, mail bombs were sent to nearly 20 government officials and business leaders. On May 1, 1919, riots broke out during May Day celebrations in Cleveland, Boston and New York. On June 2, 1919, bombs

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(holding that only the legislature may suspend the writ of habeas corpus and denying that the Commander-in-Chief power authorized the President to institute martial law in those jurisdictions where courts remained open); *Griffin* v. *Wilcox*, 21 Ind. 370, 386 (1863) (holding that the President "has the right to govern, through his military officers, by martial law, when and where the civil power of the United States is suspended by force[, but that i]n all other times and places, the civil excludes martial law—excludes government by the war power") (emphasis omitted).

exploded in eight different cities within the same hour, apparently targeting government officials including Attorney General A. Mitchell Palmer.[6] Because pamphlets from "The Anarchist Fighters" were found in the rubble of the bomb sites, the Justice Department concluded that the bombings were the work of Communists. Although the bombers were never captured, the Justice Department launched a series of raids that detained over 3000 radical aliens and deported many of them based on their membership, or suspected membership, in Communist organizations. See Espionage Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012 (repealed 1952) (authorizing deportation on such grounds).

The Attorney General believed that some citizens might also pose a serious threat to the peace and security of the nation. See *Sedition: Hearing Before the House Comm. on the Judiciary*, 66th Cong. 6 (1920) (statement of Attorney General Palmer) ("There is a condition of revolutionary intent in this country, on the part of both aliens and citizens ... manifested chiefly by the threats, both written and spoken, on the part of such persons to injure, destroy or overthrow the Government by physical force of violence."). He recognized, however, that no law authorized him to detain citizens for the same offenses for which aliens were being deported. *Charges Against the Dep't of Justice: Hearings Before the House Comm. on Rules*, 66th Cong. 29, 33 (1920) ("1920 Hearings"). Notably, the Wilson Administration did not declare the threat from anarchists and communists to be akin to war, and order the military to detain citizens believed to be enemy combatants. Instead, President Wilson requested that Congress "arm the Federal Government with power to deal in its criminal courts with those persons who by violent methods would abrogate our time-tested institutions." Woodrow Wilson, Seventh Annual Message to Congress (Dec. 2, 1919),

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[6] A more complete description of these facts may be found in David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* 117-19 (2003).

available at http://www.presidency.ucsb.edu/site/docs/doc_sou.php?admin=28&doc=7 (last visited Apr. 8, 2004); see also 1920 Hearings at 33 (urging Congress to pass a statute that would authorize detention of citizens without proof of a conspiracy).

B. The Japanese Internment. Likewise, during the infamous World War II Japanese internment, the Roosevelt Administration recognized that it did not possess a unilateral detention power. On February 19, 1942, President Roosevelt issued Executive Order 9066, which authorized an appropriate military commander to create exclusion zones from which any individual could be excluded at the commander's discretion. 7 Fed. Reg. 1407. Pursuant to that order, the military issued orders excluding "all persons of Japanese ancestry, both alien and non-alien" from certain areas on the west coast. See, *e.g.*, Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725, 3725 (May 10, 1942).

In the wake of the devastating attack on Pearl Harbor, the West Coast of the United States was widely perceived as under threat of imminent attack. See Public Proclamation No. 1, 7 Fed. Reg. 2320, 2321 (Mar. 2, 1942) (reciting that the entire Pacific Coast "by its geographical location is particularly subject to attack [and] invasion"). Executive Order 9066 itself plainly expressed the President's view that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." 7 Fed. Reg. at 1407. Yet, despite dangers perceived to be just as dire as those the nation faces today, the military did not assert that anyone refusing to comply with orders issued to protect the homeland posed an unacceptable danger to national security warranting his or her detention by the military.

To the contrary, the War Department recognized that it could not exercise an inherent military arrest power to enforce compliance with its duly issued order. It explained to

Congress that, "'[a]s things now stand orders can be issued but there is no penalty provided for violation of orders and restrictions so issued.... [P]assage of this bill was necessary ... to properly carry out the provision of the Executive order.'" 88 Cong. Rec. 2724 (1942). Rather than assert the unilateral authority to enforce its own orders, the military asked Congress to provide for criminal punishment of violators, see *id.* at 2722, which Congress quickly provided. See Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948).

C. The Steel Seizures. Although President Truman's seizure of the nation's steel mills during the Korean War did not involve the detention of citizens, it is also instructive here because of the core separation of powers principles that should inform the Court's judgment about how to proceed in this case. Both the courts (in the Civil War-era cases) and the executive branch (in the Palmer raids and internment situations) recognized that, if the national government can authorize the detention of citizens, that power resides in the political branches *as a whole.* In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952), this Court expressly rejected the assertion that military exigencies enable the President, in his capacity as Commander in Chief, to arrogate to himself authority that resides in the legislative branch.

Believing that a threatened strike against most of the nation's steel mills would "immediately jeopardize and imperil our national defense ... and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field," President Truman, acting "as President of the United States and *Commander in Chief of the armed forces of the United States*," ordered the mills seized and new labor agreements enacted. Exec. Order No. 10340, 17 Fed. Reg. 3139, 3141 (Apr. 10, 1952) (emphasis added). This Court held that a Commander-in-Chief power to seize private property could not be squared with our constitutional system, for such power "is a job for the Nation's lawmakers, not for its military authorities." *Youngstown*, 343 U.S. at

587.[7] "The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control," because "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.* at 588-89. Because the continued production of steel could have been ensured through legislative means—by eminent domain, labor laws, or other legislative enactments—the Commander-in-Chief power did not authorize the President to obtain that same result by fiat. *Id.* at 588.

* * *

The lessons of this history are clear. The Constitution requires that Congress, and not merely the President alone, determine how to deal with American citizens accused of conspiring with an enemy to commit war-like acts on American soil. Congress has not authorized the military detention of such individuals, and has instead relied upon the comprehensive system of criminal laws to deal with such cases.[8] Because this is a decision that must reflect a

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[7] The administration seeks to distinguish *Youngstown* on the ground that President Truman used civilian rather than military forces to carry out his order. Pet. Br. 36. But nothing in this Court's decision suggests the outcome would have been different had the President ordered the military to take over the mills for the purpose, "quintessentially *military*," *id.*, of securing military supplies during time of war.

[8] *See, e.g.*, 18 U.S.C. § 2339b (criminalizing conspiracy to provide material support and resources to terrorist organizations such as al-Qaeda); *id.* § 2384 (criminalizing seditious conspiracy, including conspiracy to levy war against the United States); *id.* § 2381 (criminalizing treason); *id.* § 2332b (criminalizing acts of terrorism transcending national boundaries); 50 U.S.C. § 1705(b) (criminalizing conspiracy to contribute services to terrorist organizations such as al-Qaeda); 18 U.S.C. § 924(c) (criminalizing use of destructive device during and in relation to crime of violence); *id.* § 924(c)(1)(A)(iii) (criminalizing possession of firearms in furtherance of crimes of violence); *id.* § 2332a(a)(1) (criminalizing attempted use of a weapon of mass destruction); *id.* § 844 (criminalizing certain manufacture and handling of explosive materials); *id.* § 371 (criminalizing conspiracy to commit offense against United States).

legislative and not merely an executive judgment, the President, even acting as Commander in Chief, cannot proceed unilaterally.

II. CONGRESS MUST CLEARLY AUTHORIZE ANY DETENTION OF AMERICAN CITIZENS WITHIN THE UNITED STATES.

The administration asserts that Congress has authorized the President to detain, indefinitely, any citizens in the United States whom he deems "closely associated with al Qaeda" and whom he believes has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. Br. App. 5a. The President asserts that Congress took this dramatic step and provided him with extraordinary discretion to detain citizens in the United States with the following words:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

AUMF, § 2, 115 Stat. at 224.

This language cannot bear the heavy weight the President places upon it. This Court has, since the early days of the Republic, consistently refused to read broadly worded, non-specific grants of authorization to use military force as including a general detention power like that asserted here. Indeed, the non-specific authorization to use force reflected in the AUMF has often been read narrowly. This Court has refused to allow "traditional forms of fair procedure [to be restricted] by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Greene* v.

McElroy, 360 U.S. 474, 508 (1959); *Ex Parte Endo*, 323 U.S. 283, 300 (1944) (stating "[w]e must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used").

Congress has, on occasion, purported to authorize preventive detentions in terms far more "unmistakable" than that used in the AUMF. And, as explained more fully below, those examples are instructive because they show that a clear statement rule encourages Congress to express its considered view regarding precisely what procedural protections are due under the circumstances. *Greene*, 360 U.S. at 507 ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."). Whether Congress might one day choose to present the President the kind of authority he claims here cannot be known. But what is clear is that Congress has never done so when it has squarely considered the question.

1. The Limited Reading of Prior Authorizations to Use Force. In declaring war against Great Britain on June 18, 1812, Congress provided that "the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper ... against the vessels, goods, and effects of [Great Britain] and the subjects thereof." Ch. 102, 2 Stat. 755, 755 (1812). In *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the United States Attorney for the District of Massachusetts had argued that the authorization to use force in the declaration of war also authorized the seizure of 550 tons of timber transported by a ship chartered to a British company. This Court rejected that argument. *Id.* at 125-26.

This Court's opinion highlighted the fact that after declaring war against Britain, Congress subsequently enacted separate legislation empowering the President to deal with alien enemies and to keep prisoners of war. *Id.*; see also An Act for the safekeeping and accomodation of prisioners of war, ch. 128, 2 Stat. 777, 777 (1812) (granting the President power to "make such regulations and arrangements for the safe keeping, support, and exchange of prisoners of war as he may deem expedient"). This meant that the declaration of war, standing alone, had not authorized the President to detain enemy citizens. Since "[w]ar gives an equal right over persons and property," it follows that the declaration of war, standing alone, did not authorize the President detain enemy property either. *Brown*, 12 U.S. (8 Cranch) at 126.

If, as *Brown* holds, a general declaration of war, and the accompanying general authorization to use force, failed to authorize the detention of either enemy citizens or property, *a fortiori*, it failed to authorize the military detention of United States citizens believed to have aligned themselves with the enemy. Indeed, that is precisely the holding of the notable decisions, discussed above, in which state courts upheld damages awards against military officers who detained citizens during the War of 1812. See *supra* at 8-9.

The same principle was applied during World War II. The declaration of war against Japan provided that "the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States." Declaration of War with Japan, Dec. 8, 1941, ch. 561, 55 Stat. 795, 795. During the war, the government asserted the power to detain United States citizens in two distinct contexts: martial law in Hawaii, and the internment of Japanese Americans in the western United States. Yet despite the

authorization to use *all* available resources to defeat Japan, the government never suggested that the broad authorization to use force supported either of these assertions of a detention power.

When instituting martial law in Hawaii, the government relied upon Section 67 of the Organic Act, passed by Congress in 1900 to create a territorial government for Hawaii. It provided as follows:

> That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, ... and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, *suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under marital law* until communication can be had with the President and his decision thereon made known.

Act of Apr. 30, 1900, ch. 339, § 67, 31 Stat. 141, 153 (eliminated 1959) (emphasis added).

Within hours of the Japanese attack on Pearl Harbor, the territorial governor of Hawaii issued a proclamation placing Hawaii under martial law and suspending the writ of habeas corpus. The proclamation authorized the Hawaiian Department of the United States Army to exercise all "the powers normally exercised by [the] Governor [and] judicial officers and employees," and such other powers as required "until the danger of invasion is removed." Garner Anthony, *Martial Law in Hawaii*, 30 Cal. L. Rev. 371, 393 (1942) (reprinting proclamation). President Roosevelt approved this decision. *Id.* at 372. Military courts supplanted civilian courts as the sole criminal authority in Hawaii for nearly three years. Nearly all basic constitutional guarantees were disregarded. See Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawaii, 1941-1946*, 19 U. Haw. L. Rev. 477, 512 (1997); see

also J. Garner Anthony, *Hawaii Under Army Rule* 38-39 (1955) (discussing procedures employed during military trials in Hawaii). Moreover, at least 1,500 individuals, including 617 American citizens, were detained indefinitely on suspicion of disloyalty. See Scheiber, *supra*, at 491; Memorandum from Office of Internal Security (Honolulu) to War Department No. R73740 (Nov. 30, 1945) (on file in the Hawaii Military Government Records, Record Group 338, National Archives).

Although none of the 1500 detainees filed habeas petitions,[9] in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), this Court was presented with petitions for habeas corpus from two individuals convicted by the military courts for embezzlement and assault. This Court concluded that even the Organic Act's specific authorization to impose "martial law" did not authorize the government to displace the civilian courts. This Court first recognized that the Organic Act "certainly did not explicitly declare that the Governor in conjunction with the military could for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315. The Court then reviewed the meaning of "martial law" in the history of American law and determined that its historic usage typically contemplated coexistence with civilian courts, where possible. *Id.* at 319-24. Therefore, this Court held, a Congressional authorization to place Hawaii under "martial law" did not also indirectly authorize trying civilians in military tribunals, for Congress "did not wish to exceed the boundaries between military and civilian power, in which our people have always believed." *Id.* at 324. If an express authority to impose "martial law" is not sufficient to displace civil courts, then the "clear statement" requirement is obviously a significant protection against unilateral executive branch efforts to detain citizens without judicial safeguards.

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[9] This failure reflected the detainees' fear that such an action could subject their fellow Japanese-Americans on Hawaii to the same mass detentions then occurring on the mainland. *See* Scheiber, *supra*, at 580.

The military internment orders applied against Japanese Americans in World War II provide yet another example of the high degree of clarity required before statutes will be understood to authorize military detention. As noted above, Congress, by the Act of March 21, 1942, ch. 191, 56 Stat. 173 (repealed 1948), provided legislative backing for Executive Order 9066. In *Endo* this Court held that that legislation did not clearly enough authorize the military detention of citizens.

Endo, a Japanese-American citizen who refused to accept the lawfulness of her detention, filed for a writ of habeas corpus. The Court examined the Act of March 21, 1942, in light of the Constitution's strong protections of liberty, and assumed that even a war-time measure is intended "to allow for the greatest possible accommodation between ... libert[y] and the exigencies of war." 323 U.S. at 300. The Court then noted that neither the Act nor its legislative history "use[s] the language of detention." *Id.* In the absence of any express authority to detain, this Court refused to imply it. *Id.* at 300-04.

In both *Endo* and *Duncan*, therefore, this Court applied a strong presumption that military authorizations do not permit military detentions of citizens on United States soil, or the trial of such citizens in military courts, unless Congress clearly manifests an intent to confer such an extraordinary power. Although neither case involved persons alleged to be enemy belligerents, the applicability of the presumption this Court employed does not depend on this fact. If it did, a presumption *against* implied delegations of authority to detain citizens would be transormed into a presumption in *favor* of such authority by the expedient of an administration's unchallengeable allegation that a citizen is an enemy combatant. According to the administration, the President can detain a citizen without opportunity to prove his loyalty because the citizen has not proven his loyalty. Nothing in *Endo* or *Duncan* suggests that an interpretive presumption employed

to protect the most fundamental of rights can be so easily evaded.

Nor does it matter that Endo's custodian was a civilian agency, whereas Padilla is in military custody. Pet. Br. 46. The War Relocation Authority established by President Roosevelt was specifically empowered to carry out the orders of the Secretary of War or other military commanders. *Endo*, 323 U.S. at 287. While the War Relocation Authority was nominally civilian, its entire function was to assist the Commander in Chief in his military role and to enforce orders issued by military commanders. Executive Order 9066 made clear that the actions being taken were matters of national security. *Supra*, at 13. Were the President to create a civilian "Enemy Combatant Detention Authority" to detain Padilla, his power of detention could hardly expand as a result.

In the end, the AUMF is simply too vague to meet the standards of *Brown*, *Duncan* and *Endo*.[10] The authorization to use "all necessary and appropriate force" makes no statement one way or the other on whether it authorizes the detention of American citizens in places where courts are open to enforce the law. It is, if anything, less sweeping than the authorization "to use the whole land and naval force of the United States to carry the [war with Great Britain] into effect" during the War of 1812, ch. 102, 2 Stat. at 755, or "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against [Japan and] Germany; and, to bring the conflict to a

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[10] The administration also half-heartedly argues that the Congressional statute that funds detention of prisoners of war, among others, authorizes the detention of Padilla. Pet Br. 39 (citing 10 U.S.C. § 956(5)). This argument was squarely rejected in *Endo*, where the government had argued that the detention power was ratified by Congressional funding for the Authority *after* the Authority promulgated its rules requiring relocated citizens to seek permission to leave. This Court recognized that Congress may fund a program without specifically ratifying every executive assertion of authority under the program. 323 U.S. at 303 n.24.

successful termination," Declaration of War with Germany, Dec. 11, 1941, ch. 564, 55 Stat. 796, 796, during World War II. These declarations of war were insufficient to authorize detention of American citizens. So is the AUMF.

2. Congress's Express Efforts To Authorize Detention of Citizens. The AUMF is not only substantially similar to statutes that have been held *not* to delegate a military detention power over citizens to the executive branch. It also stands in noticeable contrast to statutes that *have* clearly purported to delegate such a power to the President. Certain statutes stand out in American history for the clarity with which they appear to support an executive branch assertion of authority to detain citizens. And in those statutes, Congress not only expressly purported to authorize such detentions, it also expressly prescribed the procedural rights of the citizen to challenge that detention as erroneous or abusive.

First, in 1863 Congress passed a law authorizing the President to suspend the writ of habeas corpus. 1863 Act, § 1, 12 Stat. at 755. Suspension of the writ effectively authorizes detention outside the judicial process, because the courts would lack jurisdiction to hear any claim from the detained citizen. But the 1863 Act just as clearly provided specific procedural protections for citizens detained by the President, including protections that were tied to the judicial process.

The Secretaries of State and War were to provide a list of citizens imprisoned by presidential authority to courts in states where the administration of the laws remained unimpaired. *Id.* § 2, 12 Stat. at 755-56. Thereafter, any citizen so detained was to be released (and the officer in charge of the detention indicted for failure to do so) if the appropriate grand jury terminated its session without indicting the detainee. *Id.* That release, however, was to be conditioned upon an oath of loyalty to the United States and, if necessary, the posting of a bond to ensure good behavior. *Id.* § 3, 12 Stat. at 756. Moreover, even if the detainee were

indicted, he was entitled to be released upon posting any bail that was generally applicable to the charge. *Id.*

Although the 1863 Act allowed the President to detain a citizen without charge, it cabined that authority in time, thus preserving the fundamental rule-of-law values that form the basis of American freedom. As the *Milligan* Court noted, Congress had not "contemplated that such person should be detained in custody beyond a certain fixed period, *unless certain judicial proceedings, known to the common law, were commenced against him.*" 71 U.S. (4 Wall.) at 115 (emphasis added). Because Congress was consulted regarding the proper treatment of citizens who were militarily detained, Congress was able to provide expressly what this Court has recognized Congress always seeks to provide when enacting war-related legislation: "the greatest possible accommodation between ... liberties and the exigencies of war." *Endo*, 323 U.S. at 300.[11]

The second example of congressional authorization to detain American citizens likewise included certain procedural protections for those detained. In 1950, amid increasing fears of Communist subversion and infiltration, Congress passed the Emergency Detention Act ("EDA") over a presidential veto. Ch. 1024, tit. II, 64 Stat. 1019 (1950) (codified at 50

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[11] This Court expressed approval for Congress's balance over the administration's assertion of unchecked authority:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, and afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law ... enforced, and the securities for personal liberty preserved and defended.

Milligan, 71 U.S. (4 Wall.) at 122.

U.S.C. §§ 811-826 (1970)) (repealed 1971).[12] In passing the Act under the shadow of the Internment of Japanese Americans, Congress saw fit to "provide protection and safeguards to persons apprehended or detained under this title which are markedly greater than those accorded to persons whose relocation was ordered during World War II pursuant to legislation then in effect." H.R. Conf. Rep. No. 81-3112, at 65 (1950).

The powers of the Emergency Detention Act were to be triggered by presidential proclamation of an emergency during times of war, invasion, or insurrection, and those powers would last until terminated by either the President or Congress. 50 U.S.C. § 812(a)-(b) (1970) (repealed 1971). During a declared emergency, the Attorney General could "apprehend and by order detain ... each person as to whom there is reasonable ground to believe ... probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage." *Id.* § 813(a). Within 48 hours, a detainee was to appear before a preliminary hearing officer who was to inform him of various rights, including the grounds for the detention, the right to remain silent, the right to counsel, and the right to a preliminary hearing. *Id.* § 814(d). At the preliminary hearing, the detainee could introduce evidence and cross-examine witnesses; following that hearing the hearing officer could order continued detention or release. *Id.* Were continued detention ordered, the detainee could appeal to a review board required to hear the appeal within 45 days. *Id.* § 819(b). Judicial review of the detention was available either through appeal from

[12] The Emergency Detention Act was repealed by passage of 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The full implications of § 4001(a) for this case are addressed by other *amici*. For present purposes, this statute reflects Congress' recognition of its own constitutional obligation to shoulder responsibility—through clear statements and careful consideration of procedural safeguards—for any such extraordinary detentions.

decisions of the review board or through the writ of habeas corpus. *Id.* §§ 813(b)(4), 821.

Even when considering what kind of detention power to provide the President when investigating aliens suspected of terrorist activities, Congress has provided more procedural protections than the administration would provide an American citizen like Padilla. Though the administration initially asked Congress for the power to detain aliens suspected of terrorist ties indefinitely, 147 Cong. Rec. S11,004 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy), Congress refused. Instead, under section 412 of the Patriot Act, the Attorney General may detain aliens involved in terrorist activity or otherwise "engaged in any ... activity that endangers the national security of the United States," but must either begin removal proceedings or charge the alien criminally "not later than 7 days after the commencement of such detention." 8 U.S.C. § 1226a(a)(3)-(5). Congress provided that, even when detention is allowed, the Attorney General must review its necessity every six months, and the detainee is permitted to present evidence on his behalf. *Id.* § 1226a(a)(6)-(7). Judicial review of the detention remains available at all times. *Id.* § 1226a(b). If the administration is right, then Congress has provided greater procedural protections for aliens accused of working for al Qaeda than for United States citizens. There is no evidence for such a counter-intuitive proposition.[13]

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[13] Padilla was originally detained as a material witness in a terrorism investigation. The statute authorizing such detentions—another example of Congressional authorization to detain citizens without charge—provides substantial procedural protections. These protections, which are the same as those provided to defendants detained prior to trial, 18 U.S.C. § 3144, include a hearing in which the government must show by clear and convincing evidence that no procedures other than detention are sufficient to ensure future court appearances. *Id.* § 3142(f). The hearing must be held no later than five days after the detainee's first court appearance, and the detainee is entitled to be represented by counsel, to testify, and to present and cross-examine witnesses. *Id.*

Even the administration's principal case fits within the legal framework advanced by *amici*. *Ex parte Quirin*, 317 U.S. 1 (1942), is not, as the administration would have it, a case in which a citizen in the United States was detained solely on the President's authority, without Congressional authorization. To the contrary, Congress had specifically authorized military detention and trial. As this Court pointed out, Congress, in Article 12 of the Articles of War, had provided the military with broad authority to try "'*any ... person* who by the law of war is subject to trial by military tribunal[].'" *Id.* at 27 (emphasis added). The emphasized language had been passed in 1916 to expand the authority of courts-martial to try civilian United States citizens. Maj. Jan E. Aldykiewicz & Maj. Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 Mil. L. Rev. 74, 92-96 (2001).[14] At the same time, Congress passed Article 15, Articles of War, ch. 418, sec. 3, § 1342, art. 15, 39 Stat. 650, 653 (1916), which made clear that the creation of courts-martial jurisdiction did not affect the jurisdiction of military commissions. S. Rep. No. 64-130, at 40 n.20 (1916).

Just as important, the Articles of War passed by Congress that authorized the military to detain citizens who were believed to be enemy combatants included procedural protections for the accused. Most prominently, suspected enemy combatants detained pursuant to the Articles of War were guaranteed the right to a trial at which they could mount a defense. *In re Yamashita*, 327 U.S. 1, 9 (1946).[15] And

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[14] Notably, neither the Court nor the government in *Quirin* appears to have relied upon the broad declaration of war with Germany as authority for the detention and trial of Haupt, the citizen enemy combatant. *See* Declaration of War with Germany, ch. 564, 55 Stat. at 796.

[15] It is perhaps because of the requirement that the detained be tried that the administration does not seriously assert that Padilla's detention is authorized by the surviving version of the Articles of War (now the

Congress made clear its preference that such a trial should be conducted, when "practicable," according to the "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States." Articles of War, ch. 227, ch. II, art. 38, 41 Stat. 787, 794 (1920).[16]

At such a trial, the accused would have the opportunity, should he desire it, to dispute his status as an enemy combatant. Haupt, of course, did not dispute that he had joined the German army. *Quirin*, 317 U.S. at 20. This admission by Haupt narrows the ruling of *Quirin* even further, and significantly distinguishes the assertion of authority in that case from the authority claimed here. Haupt was detained by the military as an enemy combatant, promptly provided an opportunity to deny his status, refused to do so, and was punished according to law as a result. Padilla has been detained as an enemy combatant, denied any opportunity to challenge his status in any forum, and apparently will remain indefinitely restrained of his liberty. The administration contends that the power to detain Padilla indefinitely for alleged violations of the laws of war is included within the power to try him for that violation. Pet. Br. 33 (citing *Quirin*, 317 U.S. at 31).[17] The administration never explains why its asserted authority to detain Padilla and deny him an opportunity to dispute his status is *less* than the authority to detain Padilla on condition of providing him an opportunity to dispute his status. See 1 William Blackstone, *Commentaries* *132 (noting that "confinement of the person, by secretly

Uniform Code of Military Justice), 10 U.S.C. § 821. Pet. Br. 33. Today's provisions, like those in place when *Quirin* was decided, contemplate a military trial, something the administration has never indicated it intends to provide Padilla.

[16] The present version of Article 38 of the Laws of War, 10 U.S.C. § 836, expands the procedural protections Congress expects military commissions to provide to include not only the rules of evidence but also the "principles of law" generally recognized in criminal cases.

[17] Or, more ominously, of the power to shoot him on the spot. Pet. Br. 42 n.17

hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government" than even the power to deprive a citizen of his life). Indeed, in the criminal context, this Court has recognized that detention of an accused prior to trial is an extreme departure from our societal norms of liberty, see *United States* v. *Salerno*, 481 U.S. 739, 755 (1987), not a mere incident to the power of trial.

By insisting that the government cannot have the power to detain citizens unless Congress expressly so provides, this Court ensures that the political branches will first speak jointly to the fundamental question of what process is due in the delicate circumstances of war-related detention. On matters touching upon national security, it is entirely appropriate that the political branches should speak first. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981) ("[W]hen [Congress] acts in the area of military affairs.... the Constitution itself requires such deference to congressional choice."). The rule advocated by the administration would shut Congress out of the process. This Court should insist that it be invited in.

During the Civil War, World War II, and the communist scare of the 1950s, Congress believed that national security was sufficiently endangered to authorize the President, when he believed that circumstances were grave enough, to detain citizens in the United States outside the ordinary criminal judicial process. But even then, Congress saw fit to provide meaningful procedural protections to reduce the risk of error or abuse by the executive. Today, there is no comparable congressional authorization. Instead, it is the executive alone that has claimed that circumstances are grave enough to warrant the indefinite detention on United States soil of United States citizens that the executive believes are enemy combatants. In asserting this extraordinary power to infringe the liberty of United States citizens outside the law the President has not seen fit to await congressional

authorization—an authorization that, historically, Congress has never conferred without providing some procedural protections and safeguards. The fact that, when Congress has authorized a detention power, it has seen fit to place greater limits on that authority than the President freely places upon himself only proves that liberty is most secure when the power to make the law is placed in separate hands from the power to enforce it.

CONCLUSION

This Court should affirm the judgment of the Second Circuit below.

Respectfully submitted,

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